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IN THE COURT OF APPEALS OF THE STATE OF OREGON

COLUMBIA SEAPLANE PILOTS  
ASSOCIATION, an Oregon non-profit  
corporation, WALDO LAKE FOR  
EVERYONE!, an Oregon non-profit  
corporation, ARON FAEGRE, an  
individual person, and STEVEN K.  
STEWART, an individual person,

Petitioners,

vs.

STATE MARINE BOARD,

Respondent.

Court of Appeals No. A148192

PETITIONERS' OPENING BRIEF AND EXCERPTS OF RECORD

On Judicial Review of Administrative Rule of the State Marine Board,  
amending OAR 250-020-0221(10) (effective on February 1, 2010)  
and OAR 250-030-0030(4) (effective on June 1, 2010)

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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case and Relief Sought**

This original proceeding is an administrative rule challenge under ORS 183.400(1). Petitioners Columbia Seaplane Pilots Association, Waldo Lake for Everyone!, Aron Faegre, and Steven K. Stewart (“petitioners”) seek the invalidation of two administrative rules – OAR 250-020-0221(10) and OAR 250-030-0030(4) – that respondent State Marine Board (“the Marine Board or the Board”) promulgated to prohibit the use of internal-combustion motor boats and float planes on Waldo Lake, a large, relatively remote lake located east of Eugene in Lane County. Petitioners contend that the Board exceeded its statutory authority by enacting OAR 250-020-0221(10) and OAR 250-030-0030(4). The rule amendments directly contradict the legislative choices (1) to include Waldo Lake on the list of Oregon lakes allowing motor use at speeds up to 10 miles per hour under ORS 830.185(2), and (2) to exclude Waldo Lake from the list of Oregon lakes with motor bans under ORS 830.180. Petitioners also contend that the Board adopted OAR 250-020-0221(10) and OAR 250-030-0030(4) without complying with various aspects of the rulemaking procedures prescribed in the Oregon Administrative Procedures Act (“APA”), *see* ORS 183.325 to 183.360, as well as with another statutory procedural requirement. Because OAR 250-020-0221(10) and OAR 250-030-0030(4)

exceed the Board's statutory authority and were adopted without compliance with applicable rulemaking procedures, petitioners ask this Court to invalidate those rule amendments under ORS 183.400(4)(b) and (c).

**B. Nature of the Rule**

OAR 250-020-0221(10) amends an existing administrative rule, OAR 250-020-0221, by adding a new subsection (10) that prohibits the use of internal-combustion motor boats and float planes on Waldo Lake in Lane County. OAR 250-030-0030(4) amends another administrative rule, OAR 250-030-0030, by adding a new subsection (4) that also prohibits the use of internal-combustion motor boats and floatplanes on Waldo Lake. The two rule amendments are identical, and the rule amendment in OAR 250-030-0030(4) was promulgated for consistency with the rule amendment in OAR 250-020-0221(10).

**C. Statutory Basis of Appellate Jurisdiction**

The statutory basis for appellate jurisdiction is ORS 183.400(1).

**D. Timeliness of Petition**

The Board adopted OAR 250-020-0221(10) on January 14, 2010, and the rule amendment became effective on February 1, 2010. The Board adopted OAR 250-030-0030(4) on April 28, 2010, and the rule amendment became effective on June 1, 2010. Petitioners filed their petition for judicial review of



the rule amendments on March 28, 2011. The petition is timely because ORS 183.400(1) imposes no time restrictions to petition for judicial review of an administrative rule.

**E. Nature and Jurisdictional Basis of Agency Action**

The Board asserts that its authority to promulgate OAR 250-020-0221(10) and OAR 250-030-0030(4) is found in ORS 830.110 and 830.175. (Rec. 3, 44.)

**F. Questions Presented on Appeal**

(1) Are the rule amendments in OAR 250-020-0221(10) and OAR 250-030-0030(4) invalid under ORS 183.400(4)(b) as outside of the Board's statutory authority because the rule amendments directly contradict the legislative choice to include Waldo Lake on the list of Oregon lakes allowing motor boat use at speeds up to 10 miles per hour under ORS 830.185(2) and to exclude Waldo Lake from the list of Oregon lakes with motor bans under ORS 830.180?

(2) Are the rule amendments in OAR 250-020-0221(10) and OAR 250-030-0030(4) invalid under ORS 183.400(4)(c) as adopted without compliance with applicable rulemaking procedures because the Board adopted the rule amendments at the direction of the Governor without exercising its independent judgment and without considering any comments of interested

parties, as it was required to do by virtue of ORS 183.335(2)(G)?

(3) Are the rule amendments in OAR 250-020-0221(10) and OAR 250-030-0030(4) invalid under ORS 183.400(4)(c) as adopted without compliance with applicable rulemaking procedures because the Board failed to provide a sufficient fiscal impact statement, as it was required to do by ORS 183.335(2)(E)?

(4) Are the rule amendments in OAR 250-020-0221(10) and OAR 250-030-0030(4) invalid under ORS 183.400(4)(c) as adopted without compliance with applicable rulemaking procedures because the Board failed to cooperate with the Oregon State Aviation Board (“the Aviation Board”), as the Board was required to do by ORS 830.110(19) and ORS 835.200(2), before promulgating the rules?

### **G. Summary of Argument**

OAR 250-020-0221(10) and OAR 250-030-0030(4) are invalid because the rule amendments exceed the Board’s statutory authority and were promulgated without compliance with applicable rulemaking procedures. The Oregon Legislative Assembly made the choice to include Waldo Lake on the list of Oregon lakes allowing motor boat use at speeds up to 10 miles per hour under ORS 830.185(2) and to exclude Waldo Lake from the list of Oregon lakes with motor boat bans under ORS 830.180. The Board lacks authority to

make a different and contrary choice. Because the prohibition against motor boats and float planes on Waldo Lake under OAR 250-020-0221(10) and OAR 250-030-0030(4) is directly contrary to the legislative choice under ORS 30.185(2), to allow, *inter alia*, motor boats (including float planes) to operate at speeds up to 10 miles per hour on Waldo Lake, the rule amendments are invalid.

The rule amendments also are invalid because the record establishes that the Board did not substantially comply with various aspects of the rulemaking procedures prescribed in the APA, *see* ORS 183.325 to 183.360, or with other statutory procedural requirements. In imposing a rulemaking process, Oregon law contemplates that the administrative rules will be adopted based on the rulemaking process and the independent judgment of the administrative agency or board. Here, from initial notice of rulemaking to final adoption and publication of OAR 250-020-0221(10) and OAR 250-030-0030(4), the rulemaking process never was a free and separate act of policy adoption by the Board as contemplated by Oregon law. Instead, it was an orchestrated exercise with a foregone conclusion directed by the Governor's office. In adopting the amendments, the Board did not actually consider comments made by interested or concerned persons, as it was expected to do by virtue of ORS 183.335(3)(e). Nor did the Board decide for itself whether adoption of the rule amendments

was appropriate. Because Oregon law required the Board to consider comments and exercise independent judgment in adopting administrative rules, OAR 250-020-0221(10) and OAR 250-030-0030(4) were adopted without compliance with applicable rulemaking procedures.

The Board also failed to comply with other aspects of the rulemaking procedures. The Board did not cooperate with the Aviation Board, as it was required to do by ORS 830.110(19) and ORS 835.200(2), before promulgating the rules. In addition, the Board failed to provide a sufficient fiscal impact statement, as it was required to do by ORS 183.335(2)(E). Because of the procedural deficiencies in the rulemaking process, and because the Board lacked statutory authority to promulgate them in any event, OAR 250-020-0221(10) and OAR 250-030-0030(4) are invalid.

#### **H. Statement of Facts**

Respondent State Marine Board is a statutorily-created agency of the State of Oregon that is responsible for promulgating administrative rules and establishing state policies relating to boating. *See* ORS 830.105 (creating State Marine Board). Petitioners are two nonprofit organizations and two individuals who are adversely affected by the Marine Board's rule amendments prohibiting the use of internal-combustion motor boats and float planes on Waldo Lake. Petitioner Columbia Seaplane Pilots Association is a nonprofit organization that

represents float plane owners who utilize Waldo Lake as, *inter alia*, (a) a destination, (b) a stopover point when flying cross-country between Oregon lakes and rivers when conditions affecting safe flight require, (c) a stopover point when needed for interstate or international travel due to conditions affecting safe flight, and (d) a precautionary stopping point in the event the pilot in command determines that there is a risk that could affect the future safety of a flight. Individual petitioner Aron Faegre is a float plane pilot, and a member and current president of Columbia Seaplane Pilots Association. Petitioner Waldo Lake for Everyone! is a nonprofit organization that represents residents of the Waldo Lake vicinity and others who use the lake for pleasure boating, both by sail and by motor. Individual petitioner Steven Stewart is a member and current secretary-treasurer of Waldo Lake for Everyone!, and he has enjoyed power boating on Waldo Lake for over 50 years.

OAR 250-020-0221(10) and OAR 250-030-0030(4) accomplish a long-standing goal of the United States Forest Service ("Forest Service") to ban the operation of internal-combustion motor boats or float planes on Waldo Lake. In its initial effort to impose a ban, the Forest Service asserted that it had authority to regulate boating activity on Waldo Lake, and it adopted an administrative rule prohibiting the use of internal-combustion motor boats or float planes on Waldo Lake for most purposes. The Forest Service's ban was invalidated by a

federal district court opinion that determined that title to and jurisdiction over Waldo Lake resided with the State of Oregon, not the federal government. *See Stewart v. United States*, 639 F Supp 2d 1190 (D Or 2009).

After the Forest Service's ban was invalidated, the state undertook negotiations with the Forest Service aimed at accomplishing the same goal. Those negotiations resulted in an agreement, titled a "Memorandum of Understanding" ("MOU"), between the Forest Service, the Oregon State Land Board, and the Marine Board. (ER-13-16.) The MOU included precisely the same wording that later became the substantive content of the two rule amendments at issue here. (ER-13-14.) The MOU was signed by the participating parties on October 30 and November 5, 2009. (ER-16.)

Thereafter, the present rulemaking process was commenced.<sup>1</sup> Before and throughout that process, however, Marine Board members were informed by their legal counsel and others that, at the direct insistence of the Governor's office, the Marine Board was expected to adopt word-for-word the policy set by the MOU. (ER-31-33.) As a result, the Marine Board did not consider itself at

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<sup>1</sup> The factual statement is derived, not only from the record as filed by the Marine Board, but also from a stipulation entered into by the parties and filed with the court. A copy of that stipulation is included in petitioners' excerpts of record filed with this brief. (ER-30-34.) As the stipulation states, the stipulation was negotiated to avoid debate over whether an appointment of a special master was necessary to explore certain alleged irregularities in the rulemaking process.

liberty to decide whether any such rules were needed or, if needed, what their precise wording should be or whether there should be any exceptions to their proscription. (ER-33-34.)

At the Marine Board's regular meeting on January 14, 2010, Marine Board members expressed frustration that they were not being allowed to use their best judgment in the matter but were, instead, simply being required to carry out the policy already decided upon by the Governor's office. (ER-2-4.) Having aired their objections, four of the five Marine Board members then voted to adopt the rule. The vote did not, however, express the actual views of the members as to the desirability of amending the rules. (ER-4; ER-33-34.)

## **II. ASSIGNMENT OF ERROR**

OAR 250-020-0221(10) and OAR 250-030-0030(4) are invalid because the rule amendments exceed the Marine Board's statutory authority and were adopted without compliance with applicable rulemaking procedures.

### **A. Preservation of Error**

No preservation of error requirements apply to administrative rule challenges under ORS 183.400(1). *See* ORS 183.400(1) ("The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question").

## B. Standard of Review

Judicial review of an administrative rule under ORS 183.400(1) is limited to the wording of the rule itself in context of other rules and governing statutes, as well as the procedural record of the adoption of the rule. *Wolf v. Or. Lottery Comm'n*, 344 Or 345, 353-55, 182 P3d 180 (2008); *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992). This Court may declare a rule invalid only if the rule is unconstitutional, exceeds the agency's statutory authority, or was adopted without compliance with applicable rulemaking procedures. *See* ORS 183.400(4) (so providing).

## C. Argument

As noted, there are two administrative rules – more precisely, two administrative rule amendments – at issue in this case. The first amendment is to OAR 250-020-0221, which deals with various waters under the jurisdiction of the Marine Board. The amendment provides:

“(10) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. ‘Watercraft’ includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of



Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.”

OAR 250-020-0221(10).

The second rule amendment adds a new subsection (4) to OAR 250-030-0030, which is a statement of certain regulations under the Scenic Waterways Act. The wording of the new subsection is a verbatim rendition of the wording of subsection (10) of OAR 250-020-0221. And, as noted earlier, that wording in turn is required by the MOU, which was entered into before the Marine Board initiated rulemaking as to either amendment. We turn now to petitioners’ challenges to the two rule amendments.

### **1. General Rulemaking Standards**

Oregon administrative agencies, including the Marine Board, are solely creatures of statute. They have only such powers as the legislature has given them. *AFSCME*, 315 Or at 79; *see also Sunshine Dairy v. Peterson*, 183 Or 305, 193 P2d 543 (1948) (to the same effect). For example, substantive rulemaking authority must be specifically granted by the legislature; it will not be presumed. *See Or. Firearms Educ. Foundation v. Bd. of Higher Educ.*, \_\_\_ Or App \_\_\_, \_\_\_ P3d \_\_\_ (Sept. 28, 2011) (rule is invalid as outside of agency’s authority when not authorized by Legislative Assembly). Even when so granted, moreover (as it ordinarily is), such authority cannot be construed so

broadly as to permit an agency to promulgate a rule that conflicts with a statutory or constitutional provision. *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984); *see also Or. Firearms Educ. Foundation*, \_\_ Or App \_\_ (Sept. 28, 2011).

The rulemaking process that an agency must follow is itself entirely statutory. On occasion, part of that process will be found in the particular agency's organic statute. (Indeed, as further discussed below, this is such an occasion.) However, and even when that is true, the rulemaking procedures of the APA normally apply as well (and do so in this case, ORS 830.110(1)). *See generally* ORS 183.325 to 183.370 (describing APA rulemaking process, from notice of proposed rulemaking through publication of adopted rules by Secretary of State). Central to the process is ORS 183.335, which provides for notice of proposed rulemaking (ORS 183.335(1)); requires certain content for such a notice (ORS 183.335(2)); establishes the type of hearing that ordinarily must be held respecting a proposed rule adoption (ORS 183.335(3)); delineates the narrow exceptions to the requirement of notice and a hearing prior to rulemaking (ORS 183.335(5) through (7)); and declares specifically that "a rule is not valid unless adopted in substantial compliance with the provisions of this section" (ORS 183.335(11)(a)). This Court is directed to declare a rule invalid

if it is “adopted without compliance with applicable rulemaking procedures.”

ORS 183.400(4)(c).

**2. The Marine Board Exceeded its Statutory Authority in Promulgating OAR 250-020-0221(10) and 250-030-0030(4), Because Both Rule Amendments Are Contrary to a Legislative Choice Memorialized in ORS 830.185(2)**

As an initial matter, OAR 250-020-0221(10) and 250-030-0030(4) are invalid because the rule amendments contradict a specific legislative choice concerning the operation of internal-combustion boats and float planes on Waldo Lake. Administrative rules that are contrary to a legislative choice “[e]xceed[] the statutory authority of the agency.” ORS 183.400(4)(b); *see Planned Parenthood*, 297 Or at 565 (explicating that principle).

Oregon long has recognized the proposition that administrative agencies, which are created by statute, have only such authority as the fair intendment of the relevant statutes gives them. Axiomatically, their authority does not extend to promulgating rules that have the effect of overruling statutory choices that the legislature itself has made. The Oregon Supreme Court made this point crystal clear nearly 30 years ago, when it described the form of analysis to be used to determine whether an agency had “[e]xceed[ed] the statutory authority of the agency [under ORS 183.400(4)(b)]”:

“[T]he \* \* \* question is whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied

in the particular law being administered, or contravened some other applicable statute.”

*Planned Parenthood*, 297 Or at 565; *see also City of West Linn v. Land*

*Conservation & Dev. Comm’n*, 200 Or App 269, 113 P3d 935 (2005)

(following and applying *Planned Parenthood* in invalidating a rule of the Land Conservation and Development Commission); *Oregon Bankers’ Ass’n v. State*, 102 Or App 539, 796 P2d 366 (1990) (invalidating rule of Bureau of Labor and Industries as inappropriately narrowing scope of legislative choice under Family Leave Act).

The conflict between statute and rule in this case is obvious: Both rule amendments prohibit the use of internal-combustion boats or float planes on Waldo Lake. Yet the legislature has specifically provided, in ORS 830.185(2), that

“No person shall operate a boat with an outboard or inboard motor at a speed in excess of 10 miles per hour on the following named waters of this state located in the counties named:

“ \* \* \*

“Lane           Waldo Lake”

That specific limitation on the speed at which a person may operate a boat *with an outboard or inboard motor* necessarily proceeds from the assumption that it is permissible to operate such boats on Waldo Lake. Were such use not permissible, the legislation would be meaningless. Courts are directed by

statute to give effect to each word and phrase of a statute, if at all possible.

ORS 174.010; *see Brown v. Hackney*, 228 Or App 441, 208 P3d 988 (2009) (so stating); *Miller v. Tabor W. Inv. Co., LLC*, 223 Or App 700, 717, 196 P3d 1049 (2008) (court will not so construe statute as to render a part of it superfluous).

To construe the Board's rule amendments to be valid would be to render that part of ORS 830.185(2) that imposes a speed limit on Waldo Lake superfluous.

Put differently: The legislature implicitly intended to allow internal-combustion motor boats on Waldo Lake; it merely wished to set a speed limit for them. The Board's rule amendments, on the other hand, exceed (and invalidate) the legislative choice by banning internal-combustion motor boats entirely.

What is implicit in the statutory wording becomes explicit when one examines legislative history, as petitioners ask the court to do in this case. *See* ORS 174.020(1)(a) (in construing a statute, a court shall pursue the intention of the legislature if possible, and parties may offer legislative history of a statute to assist court in that endeavor). The legislative designation of Waldo Lake as a lake with a 10 mile per hour speed limit for motor boats was enacted in 1967. *See* Or Laws 1967, ch 547, § 2. That provision, which eventually became codified as ORS 830.185(2), began as a part of House Bill (HB) 1686. The policy embodied in the measure emerged in sessions of the House Committee

on Natural Resources and the Senate Committee on Fish and Game. In the House committee meeting, a representative of the Oregon Wildlife Federation testified that, while his organization usually favored regulation by rule, rather than by statute, defining legislative choices like those in the bill had the laudable effect of eliminating the need for extensive rulemaking hearings.

(App-7, Minutes, House Committee on Natural Resources, May 1, 1967, at p. 2 (Testimony of George Reid).) A representative of the Marine Board also testified in favor of the bill, pointing out that the only way the Marine Board could restrict the use of motor craft was in the case of a danger to the public, and that problem, he testified, was not present in the lakes that were to have speed limits created by the measure. (App-7, Minutes, House Committee on Natural Resources, May 1, 1967, at p. 2 (Testimony of R.F. Rittenhouse).)

In the Senate committee meeting on the bill, Mr. Rittenhouse again testified. He identified the elimination of the need for public hearings as a desirable effect of the bill. He also referred again to the Board's limited authority to do what the bill did; the Board was limited to regulating to protect public safety, while the legislature was not so limited. (App-9-10, Minutes, Senate Committee on Fish and Game, June 2, 1967, at p. 1-2 (Testimony of R.F. Rittenhouse).) Witness Dave Barrows further emphasized the need for overall regulation of speed on the lake, and pointed out that the Board at the

time did not have authority to deal with the issue on the policy basis on which the bill was based. (App-11-12, Minutes, Senate Committee on Fish and Game, June 2, 1967, at p. 3-4 (Testimony of Dave Barrows).) After some further discussion to the same effect, the bill was sent to the Senate floor with a “due pass” recommendation, and the present law resulted.

The inescapable conclusion from the foregoing review is that the legislature, perceiving both a desirable goal (limiting speeds on certain lakes) and twin handicaps for an agency (lack of personnel to conduct hearings and a limited basis on which it could act) to achieve that goal through rulemaking, chose as a matter of legislative policy to set the speed limits for motor boats operating on certain lakes (including Waldo Lake) by statute. That statute – ORS 830.185 – is still in force; it remains the legislative choice. The Board cannot now overrule that choice, simply because time has passed and another approach commends itself. *See, e.g., Planned Parenthood*, 297 Or at 565 (agency may not substitute its policy judgment for that of the legislature). The rule amendments in question are invalid.

Assuming that the Board will resist the foregoing, petitioners take this opportunity to anticipate at least some of the arguments that the Board may make. First, and most likely, the Board may argue that there is no inconsistency between ORS 830.185(2) and the rules as amended. That is so, the Board will

assert, because ORS 830.185(2) does not make any assumption about, much less affirmatively establish, the permissibility of boats (or float planes) operating on Waldo Lake; it simply requires that any boats (or float planes) that otherwise are authorized to operate there not exceed the speed limit of 10 miles per hour.

That argument, if made, is wrong. It changes the wording of ORS 830.185(2) to the following (addition in bold):

“No person shall operate a boat with an outboard or inboard motor [on Waldo Lake] **unless the person is authorized by some other law to do so and, even if the person is so authorized, the person shall not operate such a boat** at a speed in excess of 10 miles per hour \* \* \*.”

This wholesale addition of words (28, to be exact) is directly contrary to the instruction to courts in ORS 174.010 to neither add what has been omitted nor omit what has been inserted in construing legislative enactments. That is, any argument by the Board along these lines literally creates a new and different statute than the one before this court. That is impermissible. *See Miller*, 223 Or App at 717 (illustrating such analysis).

The argument also is wrong because it ignores the genesis of ORS 830.185 (2) and Waldo Lake's place in it. That statute first was enacted in 1959. *See Or Laws 1959, ch 148, § 1*. It was denominated ORS 488.620, with the statutory designation changed to its present one in 1995. *See Or Laws 1995,*



ch 79, § 383. As noted, Waldo Lake was added to the list of statutorily-regulated lakes in 1967. *See* Or Laws 1967, ch 547, § 2. As it happened, another lake, Munsell Lake, also located in Lane County, was added to the list at the same time. However, Munsell Lake was removed two years later (Or Laws 1969, ch 134, § 1), while Waldo Lake has remained designated as a 10-miles-an-hour motor boat lake ever since. This history further reflects the specific legislative concern with the lakes listed in the statute, one not found with respect to other lakes over which the legislature has instead given the Board more extensive authority. Thus, the Board's argument to the contrary, if made, would not be well-taken.

Second, the Marine Board may argue that, because the Marine Board has general rulemaking authority to ban boats of any or all kinds from waterways under certain conditions, the rule amendments are an appropriate exercise of that authority. But that argument, if made, is even farther afield. It is true that the Marine Board has general rulemaking authority. *See* ORS 830.110(1) (Marine Board shall have power and duty to "[m]ake all rules necessary to carry out the provisions of this chapter"). It also is true that, as a general matter, lakes and waterways fall within the jurisdiction of the Board. The Board also has more specific authority to

“make special regulations consistent with the safety and the property rights of the public or when traffic conditions become

such as to create excessive congestion, relating to the operation of boats in any waters within the territorial limits of any political subdivision of this state. The regulations may include, but need not be limited to, the establishment of designated speeds, the prohibition of the use of motorboats and the designation of areas and times for testing racing motorboats.”

ORS 830.175(1). It has similar authority respecting “the protection of game and game fish.” ORS 830.175(3). But those statutes do not help the Board here.

Where two statutes arguably deal with the same subject, the specific statute controls over the general. ORS 174.020(2). ORS 830.175 is only a general statute, clothing the Marine Board with the authority that any agency would have respecting its own jurisdiction. ORS 830.185(2), on the other hand, is a *specific* statute concerning *particular* bodies of water within the far larger catalog of bodies of water found within the state. As a result, the specific legislative choices in ORS 830.185(2) trump the Marine Board’s general authority to regulate boating on Oregon waterways.

In addition to demonstrating that it knows how to make its own decisions respecting the speed limits to be used on certain lakes, the legislature also has shown that it knows how to decide which lakes it wishes to be motor-free. *See generally* ORS 830.180 (excluding the use of “any motor for propelling a boat or for any purpose” on twenty named lakes and a named reservoir). The name of Waldo Lake is conspicuously absent from that list. The Marine Board

cannot, in this context, rely on its general rulemaking authority to trump two separate legislative demonstrations that the legislature has singled out the use of motor boats (and float planes) on certain bodies of water to be dealt with directly by the legislature, rather than leaving that subject to the more general rulemaking authority of the Marine Board.

Finally, and even if there were or could be some traction to an argument respecting the Marine Board's general authority, petitioners note (as they do elsewhere in this brief) that the Board not only never truly relied on the categorical bases for rulemaking found in ORS 830.175; it was informed by staff that those bases were not applicable to Waldo Lake. For all the foregoing reasons, this Court should end this controversy by declaring that the rule amendments in question were beyond the Marine Board's power to promulgate.

**3. The Marine Board Failed to Follow the Requirements of Notice-and-Comment Rulemaking in that It Conducted Sham Hearings and then Voted at the Instruction of the Governor's Office, Rather than in Accordance with Its Own Judgment, in Violation of ORS 183.335(4)**

Judicial review of agency rulemaking is limited to the face of the rule and issues as to whether the rule, as written: (1) violates one or more constitutional provisions; (2) exceeds the adopting agency's statutory authority; or (3) was adopted without compliance with applicable rulemaking procedures. ORS 183.400(4). In the relatively rare case in which a litigant wishes to establish

that procedural irregularities not reflected in the narrow record affected the rule adoption process, there is a procedure available to expand the record. The procedure is found in ORS 183.400(5), which provides:

“In the case of disputed allegations of irregularities in procedure which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact. The court’s review of the master’s findings of fact shall be de novo on the evidence.”

In the present case, petitioners, in filing their petition for review in this court, stated in paragraph 6 of that petition that they intended to move for appointment of a special master to supplement the record if necessary:

“Petitioners are not willing to stipulate that the agency record may be shortened. Petitioners note that, if the record certified by the Board does not contain certain evidence relevant to this petition, petitioners intend to move this court for the appointment of a special master to take evidence concerning facts relevant to the decision in this case.”

No such motion has been necessary. Thanks to the cooperation of opposing counsel and the Board, the record in this case has been expanded to include materials that usually would not have been in the record of a rulemaking case, thereby permitting petitioners to fully identify and explain their concerns. Petitioners have made extensive use of that expanded record in preparing this brief, as they expect the Marine Board will do also.

What that expanded record shows is that the Marine Board did not understand itself to be a free agent in the rulemaking process. Rather, the existence and wording of the previously-created MOU, coupled with the posture struck by the Governor's office before and throughout the rulemaking process, left the Board in the position of being required to rubber-stamp a rule that did not represent the Board's own view as to what was in the public interest with respect to Waldo Lake. That is the logical conclusion – indeed, the only conclusion – that fairly may be drawn from the record.

Based on the record and the supplement in this case, petitioners now assert as fact that the rulemaking process utilized in promulgating the challenged rule amendments was flawed by “irregularities in procedure which \* \* \* warrant reversal.” ORS 183.400(5). A catalogue of all the ways in which the Governor's office was involved in irregularities in an attempt to dictate the Board's decision respecting the proposed rule amendments would run to many pages, but a complete catalogue appears unnecessary. Petitioners submit that the following sample of those irregularities will suffice:

Representatives of the Governor's office and the Assistant Attorney General who was counsel to the Board gave detailed attention to the wording of the MOU, and particularly to Section 2 of that document, because they insisted that the wording of the rule amendments that Marine Board eventually would

promulgate should not vary from the wording in the MOU. The Board was kept apprised of this through emails from its own director and from its counsel:

“[The Governor’s representative] told me in no uncertain terms that the Governor wants the Board to adopt a rule prohibiting motors on Waldo as soon as possible. There was no room for discussion.” (ER-28-29, Email from Board director to Board members 8/19/09.) “We need to be firmly on the same page here, because under the MOU, Section 2 would become *the text that the [Marine Board] would be required to adopt verbatim in the new OAR* applicable to Waldo Lake.” (ER-27, Email from Board counsel to Board director 9/25/09 (emphasis supplied).) “Under the MOU, Oregon is agreeing to implement the standards specified in Section 2 by initiating rulemaking.” (ER-25, Email from counsel for the Board 9/29/09.)

Upon objection by the director of Marine Board that the outcome of the forthcoming rulemaking process was being predetermined by the painstaking negotiations over the wording of Section 2 of the OMU, counsel responded: “I agree that the *final* wording of the administrative rule cannot be predetermined under the Oregon APA. **But to avoid any potential fallout from agreeing to the MOU and then taking a different direction in the administrative actions leading up to the initial rule proposal,** I recommend that the notice of rulemaking set forth an *initial* proposed rule that tracks verbatim the standard

that is agreed to in the MOU.” (ER-24, Email from Board counsel to, *inter alia*, Governor’s representative and Board director 9/30/09) (emphasis in original; bold supplied).)

When finally adopted on November 5, 2009,<sup>2</sup> the MOU specifically committed Marine Board to promulgate rules that would make Waldo Lake a motor-free lake. The MOU contained the aforementioned Section 2, entitled “Standards for Public Use of Waldo Lake,” that set forth verbatim the wording that later was promulgated in the two challenged rule amendments. (ER-13-14.) The MOU then provided, “Oregon *will* initiate administrative rulemaking with the goal of adopting *the* standards set forth in Section 2 of this MOU.” (ER-14 (emphasis supplied).) Moreover, and although the Board’s formal rulemaking process had not yet begun, the MOU provided that it “takes effect upon the signature of the Forest Service and Oregon and shall remain in effect for 10 years.” (ER-15.)

While the MOU was in its last stages of formulation, Marine Board staff prepared a memorandum for the Board’s October 13, 2009, meeting that was designed to sum up the information derived from various studies concerning Waldo Lake. Among other things, it reported the following:

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<sup>2</sup> One of the three signatories signed the MOU on October 30, 2009; the other two signed it on November 5. (ER-16.) Petitioners thus treat that latter date as the effective date.

“Congestion [on the lake] is not an issue. Sailboats that use auxiliary motors for brief periods to maneuver in and out of the launch ramps are one of the sources of motorized use. Most of their time is spent under sail. This use will be eliminated, so only small day sailboats like Hobie cats or similar small sail craft that don’t require auxiliary power will be allowed. \* \* \* There is no evidence to suggest that this rule is necessary for boating safety. The extremely low use numbers and existing 10 MPH speed limit virtually eliminate the potential for accidents due to speed or collision. \* \* \* [E]fforts by the Forest Service to document water pollution from motorboats or floatplanes failed to find any evidence of water quality impacts due to extremely low levels of motorized use. We are not aware of any studies that link the existing low level of motorboat use with adverse impacts to water quality. \* \* \* An alternative to allow only clean low emission 4 stroke engines with a horsepower cap was offered by agency staff to the Forest Service during our participation in the planning process \* \* \*. This alternative was rejected, because it doesn’t fit with the desired social condition of a motor free lake. \* \* \* While the Marine Board cannot regulate floatplanes while in flight, a prohibition on all motorboats will effectively prevent floatplanes from taxiing or otherwise navigating on the lake when not in flight. \* \* \* The rule [that the Board was being asked to promulgate] will implement a Memorandum of Understanding between the Forest Service, Department of State Lands and Oregon State Marine Board which was prepared by the Oregon Department of Justice at the request of the Governor’s Office.”

(ER-22-24.) Consistent with all the discussions that had previously been held with the Governor’s office and others, staff felt obliged to recommend that any proposed amendment to the Board’s rule, OAR 250-020-0221, be stated in the wording of the MOU, and staff proposed such an amendment accordingly.

(ER-23.)



The Marine Board meeting minutes for October 13, 2009, reflect the following concerning a proposal to amend OAR 250-020-0221 in a manner consistent with the MOU:

1. The Director informed the Board that “[t]he Governor’s Office has directed [him] to sign a Memorandum of Understanding (MOU) with the Forest Service. A copy of the MOU is in the Board package.” (ER-17.)
2. Asked whether the MOU had already been signed, the Director replied that “he has been directed to do so.” (ER-19.)
3. In response to a Board member’s question, the Director informed the member that “he believes [that] the Governor’s office views the [MOU] as binding.” (ER-19.)
4. Members questioned whether the MOU could be effective without the Board’s rulemaking. The Director agreed that the Board must make the rule, but stated that the MOU “agrees to standards and states Marine Board will enter into rulemaking.” (ER-19.)
5. A board member questioned “what jeopardy does this put the Board in from the Governor?” Another member responded that “the Governor can’t legally adopt rules, the Board has to do so, but the Governor is

telling the Board in the strongest terms what he wants done and what the results shall be.” (ER-20.)

After the foregoing discussion, the Board (one member dissenting) voted to formally propose to amend OAR 250-020-0221 in accordance with the soon-to-be-signed wording of the MOU.

The original (OAR 250-020-0221(10)) Notice of Rulemaking acknowledged that the purpose of the rulemaking exercise was to “implement the US Forest Service’s plan to create the largest motor-free lake in Oregon.” (Rec. 44.) (The second (OAR 250-030-0030(4)) notice only stated that it was trying to be consistent with the other rule. (Rec. 2259, 2260, 2263, 2264.)

During the public comment period, the Board received many written submissions and a great deal of testimony concerning the proposed rule. The testimony was divided on predictable lines. (Rec. 2067-2137.) After the comment period had ended, there remained the formality of the Board adopting the rule amendment. Adoption occurred at the Board’s January 14, 2010 meeting. Staff again prepared an extensive report for the Board’s use, which reiterated that the rule amendment was not required by boating safety, boating congestion, or water quality considerations. (ER-6-7.)

The January 14, 2010, minutes reflect the Board’s unhappiness that the entire notice-and-comment process had been used when the result, as expressed

in the MOU, was preordained. The Board chairman noted that the situation was “the intersection of politics and [the Board’s] charge as Board members. It has been made very clear to him that the Board serves at the pleasure of the Governor. The Governor’s Office has made it abundantly clear, how they would like to see this issue go. It’s not what he signed up for, but it’s reality.” (ER-3.) All four of the other Board members expressed similar frustration over having the outcome of the rulemaking process dictated, without their being allowed to consider the competing policy considerations. The Board then promulgated the rule in the precise MOU wording. (ER-3-4.)

The purpose of the notice-and-comment rulemaking process set out in ORS 183.335 is not to require the agency to decide what rules to adopt based on an evidentiary record. ORS 183.335(13). Instead, the agency is proceeding in a quasi-legislative manner, and is charged simply with vindicating the public interest as it understands that interest in the circumstances. But there can be no doubt that the legislature, in creating the rulemaking process, intended that agencies *listen to and weigh* the information that the agencies receive. Thus, an agency must give notice of its intent to adopt a rule. ORS 183.335(1). The notice must contain the proposed wording of the rule under consideration, or tell an interested person where the proposed rule may be found. ORS 183.335(2)(d). It must provide a citation to the agency’s statutory authority to

promulgate the rule, a citation to the statute or statutes that the rule will implement, a statement of the need for the rule and how the proposed rule will meet that need, and an estimate of the fiscal impact of adoption of the rule on various persons and entities. ORS 183.335(2)(b)(A), (B), (C), and (E). It must affirmatively invite public comment on other options for achieving the proposed rule's purpose. ORS 183.335(2)(b)(G). Of great importance here, the notice must "give interested persons reasonable opportunity to submit data or views." ORS 183.335(3)(a). Where such data or views are submitted, the agency must maintain a record of them. ORS 183.335(3)(e). The agency is even bound to hold open its record for comments longer than the rules otherwise would require, if an interested person so requests "before the earliest date that the rule could become effective." ORS 183.335(4).

As the foregoing recitation makes abundantly clear, an agency's rulemaking process is not intended to be a sham. The agency is supposed to give interested persons the chance to contribute to the agency's consideration of a proposed rule, and to think about what it has been told. That is, it is to "consider" the data and views submitted to it. See, *e.g.*, *Bassett v. State Fish and Wildlife Comm'n*, 27 Or App 639, 642, 556 P2d 1382 (1976) (the notice requirement in rulemaking "triggers the opportunity for an agency to receive the benefit of the thinking of the public on the matters being considered"). Any

lingering doubt that could remain respecting this proposition after the foregoing recitation is dispelled by ORS 183.335(14):

“(14) When an agency has established a deadline for comment on a proposed rule under the provisions of subsection (3)(a) of this section, the agency may not extend that deadline for another agency or person unless the extension applies equally to all interested agencies and persons. An agency shall not *consider* any submission made by another agency after the final deadline has passed.”

(Emphasis supplied.) That is, an agency’s obligation to consider what is submitted to it ends only if the submission came after the deadline set by the agency for such submissions.

A comparison of the various subsections of ORS 183.335 with the rulemaking process that actually occurred in this case makes it patent that an “irregularity in procedure” occurred in this case. If, as the record recited *supra* shows, the content of the proposed rule was predetermined by the MOU and the Governor’s office, and the Board was not free to exercise its own judgment in fashioning (or choosing not to fashion) a rule, then the entire public comment period was a sham. The Board was not listening, because it was not allowed to listen. Any contrary impression created by the invitation to comment and by the two public hearings held in this case was false.

And the Board was *supposed* to listen. ORS 830.110 provides in part:

“In addition to the powers and duties otherwise provided in this chapter, the State Marine Board shall have the power and duty to:

“(1) Make all rules necessary to carry out the provisions of this chapter. *The rules shall be made in accordance with ORS chapter 183.*”

(Emphasis supplied.) Among the rules that the Board is empowered to make are rules limiting the speed limits of boats on, or banning boats altogether from, certain waters. *See* ORS 830.175 (authorizing Board to make “special regulations” concerning, inter alia, “designated speeds” and the “prohibition of the use of motorboats”). Thus, the APA requirement that rulemaking agencies listen to and consider data and views respecting proposed rules applies specifically to any effort by the Board to promulgate rules that ban motorboats on Waldo Lake. The Board did not comply with that controlling statutory law. Its failure to do so is an “irregularit[y] in procedure” under ORS 183.400(5) that requires that the rules be invalidated. It is important that this court say so.

**4. The Marine Board Failed to Follow Required Rulemaking Procedures in Amending OAR 250-020-0221 and 250-020-0030 in That It Failed to Provide Adequate Fiscal Impact Statements for Either Rule, in Violation of ORS 183.335(2)(b)(E)**

The APA provides, in ORS 183.335(2)(b), that every notice of intended rulemaking “shall include,” inter alia,

“\* \* \*

“(E) A statement of fiscal impact identifying state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of

the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include a cost of compliance effect on small businesses affected. \* \* \*

The Board's notices of intended rulemaking for both rule amendments in this case contained the same statement concerning fiscal and economic impact:

"Unknown." That is not sufficient.

In *Dika v. Depart. of Ins. & Finance*, 312 Or 106, 817 P2d 287 (1991), the Oregon Supreme Court faced a similar issue. In that case, a state agency had published a notice of proposed rulemaking that would have amended the agency's rules that stated the maximum allowable fees for copies of various materials. The notice of proposed rulemaking contained the following statement of "Fiscal and Economic Impact": "The following entities are economically affected: (a) workers' compensation insurers and (b) medical vendors." The *Dika* petitioners (an association of persons in the business of maintaining medical records and an individual in the business of supplying copies of medical records to a certain clientele) argued that such a statement was inadequate to discharge the agency's duty to state the economic impact of the proposed rule amendment on state agencies, units of local government, and the public, as required by *former* ORS 183.335(2)(b)(D).<sup>3</sup>

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<sup>3</sup> *Former* ORS 183.335(2)(b)(D) has since been redesignated and is now ORS 183.335(2)(b)(E). The pertinent text has not changed.

The Oregon Supreme Court divided the problem into three issues: (1) whether the statute was mandatory; (2) whether the agency had complied with the statute; and (3) if it had not complied, what the consequence would be. As to the first issue, the court found there could be “little doubt. The statute uses the word ‘shall’.” The court explained,

*“The provisions of the statute are protections against arbitrary and inadequately informed governmental conduct. To construe the word ‘shall’ as anything other than mandatory would thwart the intention of the legislature, rather than pursuing it. That would be contrary to the judicial role in construction of a legislative act. See ORS 174.020 (‘In the construction of a statute the intention of the legislature is to be pursued if possible’).”*

*Dika*, 312 Or at 109 (emphasis supplied).

Turning next to the issue whether the agency’s fiscal impact statement in the case before it was adequate, the court found that question equally unchallenging. The court said:

*“The statement does not attempt to [provide the information that the statute required], nor does it provide any explanation for failing to do so, such as those that might be related to inadequacy of ‘available information’ or that would be appropriate where there will be no fiscal impact. The statement falls short of meeting the mandatory requirements of the statute.”*

*Id.* at 110.

Finally, the court turned to the question of consequences. Again, its analysis was brief and pointed:



“In this case, a purported impact statement was included in the notice, but it did not comply with the statute. Accordingly, [the agency] failed to meet a statutory precondition for the valid adoption of the changes in the rule involving fees for copying [certain medical records]\* \* \*. ORS 183.400(4) provides that the reviewing court ‘shall declare the rule invalid’ where the rule was ‘adopted without compliance with applicable rulemaking procedures.’ That subsection describes this case. \* \* \* [T]he rule \* \* \* is not a valid rule \* \* \*.”

*Dika*, 312 Or at 110-11 (citations and footnote omitted).

Since the Supreme Court’s decision in *Dika*, this court has followed its lead. *See Bldg. Dept. v. Dept. of Consumer & Bus. Servs.*, 180 Or App 486, 493, 43 P3d 1157 (2002) (“‘a simple ‘we don’t know,’ without any attempt to explain *why* ‘we don’t know,’” does not satisfy ORS 183.335(2)(b)(E)”). Both cases are in point: Neither “undetermined at this time” (as in *Bldg. Dept.*) nor “unknown” (as in this case) is a statement of fiscal impact or an explanation as to why some version of one cannot be supplied. The challenged rule amendments are invalid.

##### **5. The Marine Board Failed to Carry Out its Rulemaking “in Cooperation with” the Oregon Department of Aviation in the Manner Required by Law**

Among other responsibilities, the Marine Board is responsible for regulating various activities of “boats.” A “boat” “means every description of watercraft, *including a seaplane on the water and not in flight*\* \* \*.” ORS 830.005(2) (emphasis supplied). ORS 830.110(19) further directs the Marine

Board, “[f]or purposes of ORS \* \* \* 830.185 \* \* \*, *in cooperation with the State Aviation Board*, [to] regulate boats that are seaplanes as provided in ORS \* \* \* 835.200.” (Emphasis supplied.) ORS 835.200, in turn, provides that the State Aviation Board, “[f]or purposes of ORS \* \* \* 830.185, [shall] *in cooperation with the State Marine Board*, \* \* \* regulate boats that are seaplanes \* \* \*.” (Emphasis supplied.)

Obviously, the promulgation by the Marine Board of rule amendments that prohibit landing float planes on Waldo Lake implicates the State Aviation Board’s jurisdiction over float plane operation in Oregon. Equally obviously, those amendments have the necessary effect of removing a sizable lake from the string of lakes that float planes can use in traveling up and down or over the Cascade Range. In a sense, then, the constituencies of the two agencies are potentially at odds. The question is, what does “cooperation” mean in these circumstances?

The most common and readily understood definitions of “cooperation” are “joint operation: common effort \* \* \*” and “association in a venture \* \* \* the benefits of which are shared: collective action for common well-being or progress.” *Webster’s Third New Int’l Dictionary Unabridged* (2002).

Contextually, either of those definitions would seem to be a serviceable one here: The two boards are directed by the legislature to work together to make

regulations that accommodate and harmonize the interests and concerns of the constituencies of the two agencies. And, whatever else its meaning, the act of "cooperation" would appear to require, at a minimum, conscious communication between the two boards (*i.e.*, a "consultation") and an authoritative mutual agreement on a course of action.

That is not what the record in this case discloses, however. Instead, the record contains a staff report prepared for the Marine Board (ER-5-12; Rec. 17-29) that includes the following notations:

"While the Marine Board cannot regulate floatplanes while in flight, and must regulate floatplanes in cooperation with the State Aviation Board, a prohibition on all motorboats will effectively prevent floatplanes from taxiing or otherwise navigating on the lake when not in flight." (ER-7.)

This acknowledgment of the consequences of the proposed rule amendments shows that the Board was alerted to the necessity of working "in cooperation with" the State Aviation Board. The question remains whether the Board responded to that necessity in a legally adequate way. The Board staff approached that issue obliquely:

"\* \* \*[State Aviation Board regulation] OAR 738-040-0018 is a \* \* \* rule that provides that lakes closed to motorboats by Marine Board rule are *automatically* declared to be closed to seaplanes."

(ER-22 (*italic in original*)).) That statement by staff was descriptively correct. OAR 738-040-0018 states, in part:

“Except in an emergency, seaplanes shall not land, takeoff or operate on the following waters:

“\* \* \* \* \*

“(2) Those waters listed in ORS 830.180 and in State Marine Board rules, OAR Chapter 250, Division 20, where motors are prohibited or that allow electric motors only\* \* \* \* \*

“(3) Other bodies of water as designated by special regulations and adopted in OAR Chapter 738, Division 40.

“\* \* \* \* \*”

However, a pre-existing State Aviation Board rule that prescribes certain consequences in the event that the Marine Board adopts rule amendments like the ones at issue here simply begs the question whether the statutorily-required consultation between the agencies occurred before the adoption of those particular rule amendments. As the present record shows, Marine Board staff assumed that it had done so, simply by adopting OAR 738-040-0018:

“\* \* \* The Aviation Board rule demonstrates that the Aviation Board **has already cooperated** with the Marine Board **in adopting that rule.** \* \* \* Hence, the necessary cooperation between the two boards **is already in place**, as reflected in the Aviation Board’s rule.”

(ER-10 (bold supplied).)

This is the heart of the matter, and fully illustrates the Marine Board’s misunderstanding of its statutory obligation. The Marine Board staff says that the Aviation Board “has already cooperated \* \* \* in adopting **that rule.**” But

“that,” as used in the sense just quoted, is a definite pronoun, *i.e.*, it refers to a specific, identifiable thing. And, here, the only such thing to which it can refer contextually is the proposed rule amendment. Which then begs the further question: What has the Aviation Board ever done respecting the proposed adoption of the rule amendment to which “that” refers? The answer, of course (at least as petitioners read this record), is “nothing.” The event on which Marine Board staff relies – adoption of OAR 738-040-0018 – occurred long ago, and was in no sense connected with the present proposed rule amendment. There has been no “cooperation,” as the statute demands.

If the statutorily cross-referenced duties to cooperate are to have any meaning, each new rule that implicates the jurisdiction of both boards must trigger anew the obligation to act “in cooperation,” *i.e.*, to consult and agree, on the new rule. Any other reading of the obligations imposed by ORS 830.110(19) and 835.205 translates the legislative directive into a statement to the effect that “You guys should talk once about how to deal with rules which either board wishes to create and which could affect the other board’s jurisdiction but, once you’ve done that, you needn’t ever talk again.” Hopefully, the astonishing circularity of that reading is sufficient to refute it.

It would appear that even the Marine Board is concerned that petitioners' reading of the statutes is correct, because the same staff report contains two other, cryptic comments:

“A consultation with the State Aviation Department was completed January 5, 2010, and confirmed that under Aviation’s administrative rule OAR 738-040-0018 floatplanes are automatically prohibited on lakes closed to motorboats, so no further action is required once the Marine Board adopts this rule.” (ER-11.)

Petitioners describe this comment as “cryptic,” because it does nothing more than announce once again what the outcome under State Aviation Department rules would be *if the Marine Board adopts its own proposed rule amendments*. The comment says nothing to suggest that Marine Board actually consulted with the State Aviation Board, which is the policy-making body (ORS 835.106(2)) with rulemaking authority concerning float planes (ORS 835.200(1)), for the purpose of considering the desirability, *i.e.*, the merits, of the proposed amendments.

“The Oregon Department of Aviation requested the Board to suspend the rule project pending a consultation over float planes. As noted above, a consultation with the State Aviation Department was completed January 5, 2010.” (ER-11.)

The request referred to was in an email from the “Planning and Projects Manager” of the Aviation Department that stated that “[t]he Chair of the Oregon Aviation Board (OAB) requests that the aforementioned rulemaking

process be halted and restarted only after such time as coordination and consultation with the OAB has occurred.” (Rec. 302.) However, petitioners cannot find the specifics of any such “coordination and consultation” in the record. What petitioners have been able to find, through a public records search,<sup>4</sup> is that the Aviation Board met by teleconference on January 7, 2010, and that the minutes of that meeting contain the following statement:

“Waldo Lake: It comes to [the Board]’s attention from [*sic*, probably should be ‘that’] the State Marine Board is acting to amend rules to no longer allow gasoline powered engines and only allow electric motors. This will preclude the use of this lake by seaplanes under other than emergency situations. At this time it is believed after speaking with Department of Administrative Services (DAS) and Department of Justice (DOJ) that the [the Board] need not be involved in this hearing.”

(App-13-16; [http://www.oregon.gov/Aviation/docs/meetings/FINAL\\_MINUTES\\_10\\_01\\_07.pdf](http://www.oregon.gov/Aviation/docs/meetings/FINAL_MINUTES_10_01_07.pdf).) This statement is an affirmative declaration that the Aviation Board, partly on the advice of others, took no considered action on its own respecting the rule amendments.

The foregoing recitation is elaborate, but necessarily so, in order to establish petitioners’ fundamental position: The record does not show that,

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<sup>4</sup> Petitioners respectfully request that this court take judicial notice of the public record of the Aviation Board’s minutes. *See* OEC 201(b) (court may take judicial notice of an adjudicative fact if it is “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

preliminary to or during the rulemaking at issue, the Marine Board acted “in cooperation with” the State Aviation Board, and vice versa. Instead, Marine Board acted, but the State Aviation Board excused itself from performing its statutory duty. The preliminary statutory requirement not having been observed, the ensuing rulemaking was not authorized. The rules in question thus should be deemed invalid, either because the Marine Board lacked authority to adopt the rules (*see* ORS 183.400(4)(b)) without meeting the consultation requirement or because the Marine Board failed to comply with applicable rulemaking procedures (*see* ORS 183.400(4)(c)).

### **III. CONCLUSION**

Petitioners respectfully submit that all four of their arguments under the assignment of error are well taken. However, petitioners add this consideration: Three of the four arguments, if sustained, will simply result in invalidation of the offending rule amendments, but will accomplish no true resolution of the problem. It therefore would be in the best interests of both the Board and the petitioners if this court were to announce an answer to the largest question presented by this case, *viz.*, whether the Board has the statutory authority to promulgate rule amendments with the substantive content of the amendments in question. If it does not, it does no party any good to have the Board correct its procedural errors and then promulgate the same impermissible rule amendments



again – a likely prospect, unless the Board is told that it may not do so.

Petitioners therefore take the liberty of urging the court to declare the rule amendments invalid because the Board had no statutory authority to promulgate them, and to address the other issues presented only if the court finds that the Board did have such statutory authority.

For all of the reasons set forth above, the challenged rules are invalid.

Dated this 19th day of October, 2011.

SCHWABE WILLIAMSON & WYATT P.C.

/s/ W. Michael Gillette

W. Michael Gillette, OSB No. 660458

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and Steven K. Stewart

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05(2)(d)**

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 9.882.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ W. Michael Gillette

W. Michael Gillette, OSB No. 660458  
Of Attorneys for Columbia Seaplane Pilots  
Association, Waldo Lake for Everyone!, Aron  
Faegre, and Steven K. Stewart

**CERTIFICATE OF FILING AND SERVICE**

I certify that October 19, 2011, I filed the original of this PETITIONERS' OPENING BRIEF with the State Appellate Court Administrator by the Court of Appeals' eFiling system.

I further certify that on October 19, 2011, I served two copies of the PETITIONERS' OPENING BRIEF on the following parties by the United States Postal Service, first-class mail, at the following addresses:

John R. Kroger  
Mary H. Williams  
Denise Fjordbeck  
Oregon Department of Justice  
1162 Court St. NE  
Salem, Oregon 97301-4096

Of Attorneys for Respondent State Marine Board

By: /s/ W. Michael Gillette  
W. Michael Gillette, OSB No. 660458  
Of Attorneys for Columbia Seaplane Pilots  
Association, Waldo Lake for Everyone!, Aron  
Faegre, and Steven K. Stewart

**INDEX TO APPENDIX  
FOR PETITIONERS' OPENING BRIEF**

<b>Description</b>	<b>App No.</b>
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OAR 250-020-0030	<b>APP-4 – APP-5</b>
Excerpts from Minutes, House Committee on Natural Resources, May 1, 1967.	<b>APP-6 – APP-8</b>
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Oregon Aviation Board Teleconference, Meeting Minutes, January 7, 2010, 2 p.m.	<b>APP-13 – APP-16</b>

*Or. Admin. R. 250-020-0221*

APP-1

OREGON ADMINISTRATIVE RULES  
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\*\*\* September 1, 2011 Oregon Bulletin \*\*\*

CHAPTER 250 OREGON STATE MARINE BOARD  
DIVISION 20 LOCAL AND SPECIAL RULES

*Or. Admin. R. 250-020-0221 (2011)*

250-020-0221 Boat Operations on Certain Waters in Lane County

(1) No person shall operate a motorboat in excess of 5 MPH ("Slow-No Wake") in the following areas:

(a) Triangle Lake: Within 200 feet of a marked swimming area or a designated public launching ramp;

(b) Fern Ridge Lake:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) In the Coyote Creek Channel;

(C) Between shore and buoy line which extends southerly from the north shore to a point approximately 200 feet of the northern most Eugene Yacht Club mooring dock thence generally south and west approximately 200 feet of the docks to a point approximately 200 feet south of the Tri Pass Club mooring dock thence generally west to the southern tip of the Tri Pass Club dock as buoyed except for the buoyed corridor immediately south of the Eugene Yacht Club southernmost dock;

(D) South of the buoy line which extends easterly from a point approximately 100 yards north of the Perkins Boat Ramp to the adjacent shoreline;

(E) In the Main Long Tom River Channel.

(c) Dexter Dam Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) Within 50 feet of the causeway crossing the reservoir.

(d) Lookout Point Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) East of the Southern Pacific Railroad bridge.

(e) Dorena Dam Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp.

(B) Southeast of a line between markers on Humphrey Point and the northeast shore.

(f) Cottage Grove Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) South of a line between a marker on the east shore, near the Wilson Creek area, and on the west shore near Cedar Creek.

(g) Hills Creek Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp; APP-2

(B) On Packard Creek arm west of Rigdon Road (USFS Road #21);

(C) On Hills Creek south of the Hills Creek Crossing Bridge;

(D) On the Middle Fork, Willamette River south of the Rigdon Road (USFS #21) (Upper Crossing) Bridge;

(E) No person shall operate a motorboat for any purpose on Larison Creek arm west of Rigdon Road (USFS Road #21).

(h) Collard Lakes;

(i) Picket Lake;

(j) Munsel Lake -- west of the line of marker buoys;

(k) Fall Creek Lake:

(A) Within 200 feet of a designated public launching ramp or marked swimming area;

(B) On Fall Creek upriver from the buoys located approximately 200 feet downstream of the Big Fall Creek Road;

(C) On Winberry Creek upriver from the buoys located approximately 1800 feet downstream of the Winberry Creek Road Bridge.

(l) Siltcoos Lake:

(A) Within 200 feet of a designated public launching ramp or marked swimming area;

(B) Between shore and buoy line at the mouth of Kiechle Arm beginning at a point at the east shoreline of Arrowhead Point and extending northerly approximately 900 yards to a point approximately 100 yards off shore of Camp Baker during the period of June 1 through September 30.

(C) In Miller Arm north of the buoy line, located at the entrance near Nightingales' Fishing Camp, during the period of May 1 through September 31.

(2) No person shall operate a motorboat in excess of 5 MPH on Leaburg Reservoir and the McKenzie River from the dam upstream to Good Pasture Bridge.

(3) No person shall operate a motorboat in excess of a "Slow-No Wake" speed within 300 feet of a boat launching ramp or a boat moorage on the following bodies of water (for purpose of this regulation, "Slow-No Wake" speed means the speed of a boat shall not exceed 5 MPH):

(a) Cougar Reservoir;

(b) Blue River Reservoir;

(c) Siuslaw River -- between the river entrance and the highway bridge at Mapleton.

(4) No person shall operate a motorboat for any purpose on the following lakes: Scott, Melakwa, Hidden, Blair, Upper Erma Bell, Middle Erma Bell, Lower Erma Bell, Torrey, Whig, Wahanna, Rigdon, Lower Rigdon, Kiwa, Upper Eddeeleeo, Round, Betty, and Alameda.

(5) No person shall operate a motorboat for any purpose in excess of 10 MPH on Munsel Lake east of the line of marker buoys, except from June 1 through September 30, between the hours of 10 a.m. and 5 p.m.

(6) No person shall operate a motorboat on the McKenzie River above Good Pasture Bridge, except a

representative of the Oregon State Police or the County Sheriff's Office pursuant to a criminal investigation or search and rescue operation.

(7) No person shall operate a motorboat, except with an electric motor:

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(a) In the Old Long Tom River Channel;

(b) On Fern Ridge Reservoir south of State Highway 126;

(c) On Hult Reservoir.

(8) No person shall operate a propeller-driven airboat or non-displacement hull type hovercraft in the following areas on Fern Ridge Reservoir where there is emergent vegetation present:

(a) Coyote Creek area -- east of a line beginning at the West Coyote Creek bridge at Highway 126 extending north approximately one mile to a point near the mouth of Coyote Creek, then extending north approximately 1.4 miles to a point located approximately 100 yards off shore of the northwest corner of Gibson Island;

(b) Amazon Bay area -- east of a line beginning at a point located approximately 100 yards off shore of the northwest corner of Gibson Island extending northeast approximately one mile to the Shore Lane access;

(c) South Marsh area -- west of a line extending from a point on the shoreline at the southern boundary of Zumwalt Park near the end of Vista Drive extending southeast approximately one mile to a point on the shoreline at the tip of Perkins Peninsula;

(d) Long Tom Area -- southwest of a line beginning at a point on the shore line at the end of Moyer Lane extending southeast approximately 0.9 miles to a point on the west shoreline of the Jeans Peninsula at the north end of Winter Lane.

(9) No person shall operate a motorboat north and east of a line across the entrance of Bannister Cove on Lookout Point Reservoir, as marked.

(10) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

Statutory Authority: ORS 830.110 & 830.175

Statutes Implemented: ORS 830.175

History: MB 21, f. 8-23-63; MB 27, f. 6-3-65; MB 31, f. 6-20-66; MB 42, f. 12-3-68; MB 44, f. 8-21-69; MB 48, f. 6-28-71, ef. 7-25-71; MB 49, f. 8-14-72, ef. 9-1-72; MB 3-1979(Temp), f. & ef. 6-22-79; MB 5-1979, f. 7-31-79, ef. 8-1-79; Renumbered from 250-020-0131; MB 8-1981, f. & ef. 11-16-81; MB 5-1982, f. & ef. 6-1-82; MB 6-1982, f. & ef. 6-1-82; MB 15-1984, f. 11-30-84, ef. 12-1-84; MB 6-1995, f. & cert. ef. 7-14-95; MB 9-1996, f. & cert. ef. 5-29-96; OSMB 2-2000, f. & cert. ef. 7-14-00; OSMB 2-2001, f. & cert. ef. 1-25-01; OSMB 1-2008, f. & cert. ef. 1-15-08; OSMB 3-2010, f. & cert. ef. 1-15-10; OSMB 9-2010(Temp), f. & cert. ef. 5-6-10 thru 9-30-10; Administrative correction 10-26-10; OSMB 13-2010, f. & cert. ef. 11-1-10; OSMB 5-2011(Temp), f. 3-28-11, cert. ef. 4-8-11 thru 4-11-11; Administrative correction, 4-25-11; OSMB 10-2011(Temp), f. 6-30-11, cert. ef. 7-1-11 thru 10-1-11; OSMB 10-2011(Temp) Suspended by OSMB 11-2011(Temp), f. & cert. ef. 8-5-11 thru 10-1-11, Administrative correction, 8-25-11

#### NOTES:

Or. Admin. R. 250-030-0030

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## OREGON ADMINISTRATIVE RULES

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\*\*\* September 1, 2011 Oregon Bulletin \*\*\*

CHAPTER 250 OREGON STATE MARINE BOARD  
DIVISION 30 SCENIC WATERWAYS

Or. Admin. R. 250-030-0030 (2011)

## 250-030-0030 Regulations

The State Marine Board is authorized to carry out the provisions of the Federal Wild and Scenic Rivers Act (PL 90-542) and the State Scenic Waterways Act (ORS 390.805 to 390.925) under ORS 830.175 by regulating boat use through a permit system initiated by the Board. Authority to limit or prohibit motorboat use is also granted by this statute. The specific regulations which follow are adopted in accordance with these statutory provisions:

(1) In order to meet the goals and objectives of management and recreation plans for the subsequently named rivers, the State Marine Board will regulate commercial and noncommercial boat use, both for non-powered boats and for motorboats, by means of a permit system. On occasion the Board may find it necessary to establish interim boat use levels in order to protect the riverine environment and assure to the users a quality recreation experience. Such limits may be prescribed in those instances where, in the absence of river management or recreation plans, it finds it necessary to act to assure compliance with the objectives of appropriate federal and state laws.

(2) It is the policy of the State Marine Board to provide for equitable use of certain designated rivers by commercial and noncommercial boaters. A system of permits for all boaters, whether they plan to run a river as private individuals or as patrons of a commercial entrepreneur, may be initiated on controlled rivers when use approaches or exceeds approved levels or capacity.

(3) No person, other than a member of the Department of State Police, county sheriff, and governmental agencies of this state and the federal government having jurisdiction over the following described waters, shall use a motor for propelling a boat for any purpose on the following described waters, with the exceptions stated:

(a) Deschutes River:

(A) That portion bordering the Warm Springs Reservation, no motors year round. (ORS 830.180)

(B) Between the northern boundary of the Warm Springs Reservation and the mouth of Buckhollow Creek (downstream from Sherars Falls), no person shall operate a motorboat with the exception of ingress/egress by landowners under permit issued by the Board.

(C) Between the mouth of Buckhollow Creek and Macks Canyon Campground, no motors from June 15 to September 30, with the exception of ingress/egress by landowners under permit by the Board.

(D) Between Macks Canyon Campground and the Heritage Landing boat ramp, motors will be prohibited during alternating Thursday, Friday, Saturday and Sunday periods commencing with the first Thursday to Sunday period that falls on or after June 15, continuing until September 30. No daily restrictions on motorized use from October 1 to June 14.

(E) Between Heritage Landing boat ramp and the confluence with the Columbia River, no prohibitions on motors, except for OAR 250-030-0041 rule for slow no wake, maximum 5 MPH.

(b) Illinois River -- From Deer Creek downstream to Nancy Creek, which is located in the area immediately upstream of Oak Flat.



(c) John Day River -- From State Highway 218 bridge at Clarno downstream to Tumwater Falls between May 1 and October 1.

APP-5

(d) Minam River -- From Minam Lake downstream to the Wallowa River.

(e) Owyhee River System:

(A) West Little Owyhee;

(B) North Fork Owyhee; and

(C) The mainstem Owyhee River above approximately river mile 70 at Pinnacle Rock, as marked.

(f) Rogue River -- from Grave Creek downstream to the lowermost portion of Blossom Bar Rapids approximately 250 feet upstream of the top of Devil's Staircase Rapids as marked, between May 15 and November 15.

(g) Sandy River -- From Dodge Park downstream to Dabney State Park.

(4) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

Statutory Authority: ORS 830.110 & 830.175

Statutes Implemented: ORS 830.110 & 830.175

History: MB 53, f. 9-25-73, ef. 1-1-74; MB 64, f. 2-18-75, ef. 3-11-75; MB 66, ef. 4-22-75(Temp), 5-11-75(Perm); MB 76, f. & ef. 5-27-76; MB 79, f. 1-20-77, ef. 5-27-77; MB 89, f. 12-27-77, ef. 1-1-78; MB 12-1984, f. 8-13-84, ef. 8-14-84; MB 12-1985, f. & ef. 7-31-85; MB 21-1985, f. & ef. 12-4-85; MB 3-1993, f. 2-4-93, cert. ef. 5-15-93; MB 4-1994, f. & cert. ef. 3-23-94; MB 15-1996, f. & cert. ef. 12-4-96; MB 6-1997, f. & cert. ef. 5-30-97; OSMB 5-1998, f. & cert. ef. 4-3-98; OSMB 5-2010(Temp), f. & cert. ef. 1-15-10 thru 6-30-10; OSMB 10-2010, f. & cert. ef. 5-6-10

#### NOTES:

#### LexisNexis 50 State Surveys, Legislation & Regulations

Boating & Water Vessel Registration & Safety

In

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COMMITTEE ON NATURAL RESOURCES

Room 107

1 P.M.

May 1, 1967

Members Present: Reps. Ouderkirk, Chairman: Sam Johnson, Vice Chairman: Boe, Bradley, Chuinard, Detering, Guynes, Hanneman, McKenzie.

Witnesses: Rep. Tom Bessonette, Baker & Grant Counties  
Rep. Wally Priestley, Multnomah County  
Mr. Otis W. Foiles, U. S. Forest Service, Portland  
Mr. George Reid, Baker, Oregon Wildlife Federation  
Mr. R. F. Rittenhouse, State Marine Board, Salem  
Mr. Ed Branchfield, Legal Counsellor, Governor's office  
Senator Cornelius Bateson, Marion County, Salem  
Mr. Scott McArthur, League of Oregon Cities  
Mr. Fred H. Paulus, former deputy state treasurer

The Chairman called the meeting to order.

HB 1686 - Use of Motorboats on Lakes & Reservoirs

Mr. Foiles from the U.S. Forest Service, testified first in regard to the measure stating his agency is in favor of this bill which would control the speed of motorboats or, in some cases, would eliminate the use of same on small lakes within the National Forest. Only three or four of the lakes mentioned or named in this bill are not in the National Forests. In the case of Waldo Lake the reason for the request of a speed limit is the noise level and the compatibility with the wilderness environment. In most of the other lakes, however, the size is the factor.

Mr. Foiles stated that his agency's recommendation would be to insert a phrase relating to "in the case of an emergency the 10 m.p.h. speed limit could be exceeded". The exception could be given at the first of the bill or quoted immediately following "Waldo Lake". The placing of this phrase would not be too important.

Rep. Bessonette, Baker County, appeared again before the committee to state he had contacted the Powder River Sportsmen's Club; and it was his understanding that that group had voted in opposition to the closures of the lakes listed in Baker County. However, since this contact, he had received various communications, and he concurs with the thought that Anthony Lake and Goodrich Lake should be listed in the section where no motors would be allowed (Page 2 of the bill), with the rest of that section referring to Baker County being deleted.

It was brought out by questions from Rep. Johnson that Rep. Bessonette feels that if anyone can CARRY a motor into any one of these lakes, he should be allowed to use that motor, including any wilderness or restricted areas. He added that he did not feel this should be allowed in the primitive areas, however. Rep. Johnson commented that what the committee is trying to do in the first part of the bill is maintain a quiet atmosphere, etc., in these areas, whether or not they are "wilderness".

Rep. Boe asked if the lakes which are within the Forest Service's jurisdictions are subject to the rules and regulations of the Marine Board, and the answer to this was in the affirmative. The Marine Board presently has the power to authorize by regulation the complete removal of motors from any one of these

May 1, 1967

given bodies of water, no matter where they are. This is something which may be done after public hearings.

Chairman Ouderkirk stated the reason HB 1686 has been presented to this Committee is so that someone who lives in an area other than where a particular lake is located, may read the bill and know which lakes are restricted and which are not. Most of these lakes are relatively small, it was mentioned by Chairman Ouderkirk, and not lakes, for example, where any water skiing is going to be done.

Mr. George Reid, Baker, Oregon, chairman of the Legislative Committee, Oregon Wildlife Federation, appeared at this time to state that the OWF takes the position of favoring this bill. This seems to them to be an appropriate approach of the Marine Board to regulation of the use of these lakes.

Mr. Reid also stated that his Federation has long been in favor of having restrictions established by regulation rather than by statute; but it seems that in this case it is difficult to come up with regulations due to the many lakes in the many counties which would require a long series of hearings, much travel, etc. This has been discussed at some length in his committee, and they have come to the conclusion that they favor this type of legislation. Incidentally, Mr. Reid stated that as a long time resident of Baker County he had visited every lake listed in this bill at least once. Mr. Reid is a past president of the Powder River Sportsmen's Club.

Mr. Rittenhouse, Director, State Marine Board, appeared at this time, and described some new amendments which have been prepared for the bill. He added that this bill involves a long-range program of the Forest Service -- one which has been planned up until the year 2,000. A study has been made of the many uses of these lakes; and in cases where a number of agencies are involved, it would seem desirable to have rules or regulations taken care of by statute, rather than regulation. The only time the Marine Board can restrict the use of motors is when it is consistent with the safety of the public. It cannot be done to eliminate noise strictly, or to make a lake a fishing lake only.

Mr. Rittenhouse also stated that he had received a letter from both Mr. Schneider of the State Game Commission and Mr. Stone of the Forest Service stating that they were agreeable to a 10-mile restriction on these lakes. He would personally prefer not having the "in case of an emergency ----" phrase in the bill; it is his opinion that any officer should use good judgment in a case such as this.

Rep. Boe stated he feels sure that the same objections which have been raised regarding Baker County could be raised in almost any one of the counties which appear in the bill with regard to the lakes, if people were aware of what was happening to them.

It was brought out by questions from Rep. Bradley that the SMB does not have the authority to regulate by horsepower -- it amounts to either complete removal of the motor, or else the motor is allowed on a lake or reservoir. Speed restrictions may be set, however.

#### HB 1519 - Setting of Air Quality Standards

Rep. Wally Priestley, Multnomah County, appeared at this time as the sponsor of this bill and explained its purpose. This bill has been heard several times,

May 1, 1967

Chairman Oederkirk had earlier asked Legislative Counsel to take this bill and SB 9 and prepare some amendments which would compensate for their differences. These changes are in the amendments which Mr. Branchfield stated he felt were not correct. This bill conflicts with SB 9 as to the bonding capacity. The emergency clause in this bill presents another conflict with SB 9.

The Chairman stated this bill would be discussed again at a later hearing and the meeting was declared adjourned.

Respectfully submitted,

*Myra Taylor*  
Myra Taylor, Clerk

## SENATE COMMITTEE ON FISH AND GAME

June 2, 1967

8:30 a.m.

300 State Capitol

Members present: Senators Naterlin, Chm., Chapman, Vice Chm.,  
Houston, Elfstrom, Inskeep.

Witnesses: Mr. Robert Rittenhouse, Director, Marine Board  
Mr. Dave Barrows, Assoc. of O. and C. Counties  
Mr. Robert Holloway, State Game Commission.

HB 1686

Mr. Rittenhouse stated that HB 1686 refers to regulating a few lakes in the National Forest. He said that some time ago the United States Forest Service referred to the State Marine Board a request that a number of lakes (about 80) in the National Forest be regulated. The Forest Service had just completed a long range study, going into the year of 2000 as to the potential recreation sites needed to meet the public demands, and these particular lakes would place a part in that study. The Marine Board had met twice with the Forest Service for a discussion in regard to these lakes, and representatives of the State Game Commission were also present and these agencies endorsed the proposed regulations.

There are two approaches as to regulations. One is by regulation by the board, after a public hearing, and the other is by legislation. To accomplish this by statute, it would do away with the need for public hearings.

After several hearings on this bill in the House it was recommended by the Natural Resources Committee that the small lakes be regulated by the Marine Board. But on large lakes the Marine Board's authority is questionable. The statutes say that our regulations must be consistent with safety, and by the opinion of the attorney general, whom we have been guided by for several years in setting up these regulations, we do not have the authority to set a lake aside, e.g., this is a lake for fishing. Mr. Rittenhouse said that he had filed some regulations, after a hearing in Douglas County, on a new reservoir, where he had set a time for fishing and a time for water skiing to avoid conflicts.

Mr. Chairman inquired of Mr. Rittenhouse as to how he would classify a lake as large or small.

Mr. Rittenhouse replied that in this bill they had taken 100 acres, with the exception of one small lake in Jefferson County. On Dark Lake, which is 16 acres, there is a Girls' Camp and it has been requested that the lake be set aside for canoeing and swimming. It is desirable

to have this lake regulated as soon as possible, as this bill carries an emergency clause; this lake was included. Charlton Lake which is 100 acres is taken out because the Forest Service plans to siphon water from this lake in a gravity system for Waldo Lake Campground.

Lakes to be added to those that have already been regulated by the Legislature are:

Clear Lake	Clackamas	600 acres
Hosmer	Deschutes	112 acres
Lava	Deschutes	368 acres
Little Cultus	Deschutes	300 acres
Little Lava	Deschutes	120 acres
Sparks	Deschutes	385 acres
Munsel	Lane	103 acres
Waldo	Lane	6000 acres

Senator Elfstrom inquired of Mr. Rittenhouse if the Marine Board now controls all lakes as to speed, boat motors, etc.

Mr. Rittenhouse explained that the Marine Board regulations must be for "safety."

Senator Elfstrom was of the opinion that the Marine Board should be given the authority to set these regulations without the help of the legislature every session.

Mr. Rittenhouse replied that this had been suggested and he felt that it should be considered for the next legislative session.

Mr. Barrows stated that their interest in this bill has only to do with one lake, Waldo Lake in Lane County. It has been pointed out that Waldo Lake is a large lake of 6000 acres. The Forest Service is at the present time developing what is going to be one of the finest family park and recreational sites in the state. He said their interest is that they have put into this about 1/2 a million dollars and plan to be putting more into it-- it is going to be an outstanding recreational site. The road is being located about a mile away from the lake so that it can't be seen from the lake, and is being planned with great care. It is the desire of the Forest Service that this lake be utilized for family swimming, boating and fishing and not be used for water skiing and high speed boats. They feel with Fernridge reservoir, Look-out, etc., in Lane County already, that there is no need further for a water skiing area-- that this be restricted to slow boating, fishing and swimming, and Mr. Barrows concurs with this. According to the attorney general's opinion, the State Marine Board can use only the one criteria of safety: determining the regulations of speed on lakes. They would be unable on a 6000 acre lake to put a speed restriction on

it. For this reason, they are quite concerned-- they are putting a lot of money into it, the Forest Service is putting a lot of money into an outstanding recreational development which might turn out to be a place where all of the kids would want to go to water ski, and it would not be compatible then for family recreational use.

Mr. Barrows, speaking in reference to Senator Elfstrom's comments, felt that they were very apropos and indicated that he would be very happy to work with anybody during the interim to expand the regulatory authority of the State Marine Board in setting these regulations on speedboats on lakes, because he agreed that it should be done by regulation and not by statute. But right now, they are in a position where there is no authority for them to make these kinds of determinations, except in the one criteria: public safety.

Mr. Chairman inquired as to how soon the Forest Service anticipates they will have this project in service.

Mr. Barrows replied, a year from this summer. That is the fear that they have-- they can't wait until the next legislative session.

Mr. Holloway stated that prior to the session when they met with their fisheries staff, they had the opportunity to go over the original list of lakes which were appropriated in HB 1686, and were in general agreement with the list that was included in the original bill. He said they had one minor reservation to start with and that was on Waldo Lake. They didn't feel at that time that it was necessary to have this 10 mile per hour speed limit on the entire lake but after becoming acquainted with the plans the Forest Service has for Waldo, and their desire to keep that lake as a family recreational lake, they suggested that there be a perimeter speed limit restriction. He said, "I am sure you know that the Forest Service has had the regulatory authority-- does make regulations on some of the lakes. However, one of the problems apparently is enforcement." They do not have enforcement personnel and he felt that their feeling is if this can be done by the state, either through an Act in the statute, or by regulation of the Marine Board, there will be better enforcement, either through the sheriffs' or primarily through the state police personnel. He said, "We did testify in the House that we prefer that these things be done by regulation rather than by statute, but we recognize, however, that the State Marine Board doesn't have the staff or the time to carry out a series of hearings around the state."

As far as the existing bill is concerned, Mr. Holloway said, they have no opposition to it. The regulatory authority of the Game Commission is confined to such as methods of fishing, and they do exercise this-- in other words, no fishing from a boat with an outboard motor, or no fishing at all, and in this type of thing-- their authority is

confined just to fishing. He felt that the day is fast approaching, or already here, when some agency such as the Marine Board's authority should be broadened. He felt that the lakes will eventually have to be zoned, e.g., Suttle Lake, where they have installed buoy lines, etc. Certainly the day is coming because of the high recreational use of these lakes and user conflict, zoning will be necessary either by zoning or statute. The Game Commission is in favor of the bill and would like to see it pass.

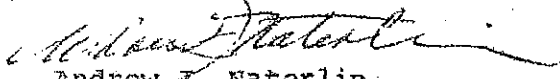
Senator Elfstrom inquired of Mr. Holloway if the Game Commission plans to see to it that there will be fish in Waldo Lake, since it is going to be a family lake.

Mr. Holloway felt that the Commission will have to step up its production program.

Senator Inskeep moved to send the bill out do pass, seconded by Senator Elfstrom. On roll call vote motion carried, Senator Chapman voting "no." Senator Elfstrom will lead the floor discussion.

Meeting adjourned.

Respectfully submitted,

  
Andrew J. Naterlin  
Chairman



**Oregon Aviation Board Teleconference  
January 7, 2010, 2 p.m.**

*Hosted by Gregg Dal Ponte – Interim Director for the Dept. of Aviation*

*Attendees: Chris Cummings, ODA Planning & Projects Manager; Mitch Swecker, ODA State Airports Manager; Craig Bonney, ODOT; Renee' Stryker, ODA secretary.*

*Board members via phone: Mark Gardiner, Board Chair; Chris Corich, Vice-Chair; members: Jack Loacker, Nan Garnick, Steve Beckham, Joe Smith, and Larry Dalrymple.*

This meeting was called together by Gregg Dal Ponte for the board to approve two items; the justification for temporary rule making and the proposed temporary rules.

Gregg: two emails were sent to the Oregon Aviation Board (OAB) members in preparation for this teleconference; the justification for temporary rule making and the proposed temporary rules. Additionally an email from Chris Cummings identified candidates for proposed membership on the Aurora Master Plan Advisory Committee (PAC). Individuals were selected by Chris Cummings and Gregg Dal Ponte.

Gregg explained to the board the temporary rulemaking process. Temporary rules are adopted by the Board and filed with the Secretary of State. The rules will be valid for a period of 180 days and this will allow processing of suspended agreements/leases. The Oregon Department of Aviation (ODA) is only requesting to change a few rules that require immediate revisions under temporary rulemaking.

It is very obvious all ODA rules need to be reviewed and updated to reflect current business practices. This has not apparently been done since 2004. Starting with an inventory, the process of reviewing all ODA agency administrative rules will take a considerable amount of time. This needs to be a priority and commenced immediately by the agency.

It is Gregg's recommendation to adopt these temporary rules. The statutes state there must be a justification in order to proceed.

Larry Dalrymple joined the teleconference at approx. 2:15 pm.

Larry was updated by Mark on the discussion of the justification and the adoption of the temporary rule making.

ORS 183.335 Notice; content; public comment; temporary rule adoption, amendment or suspension; substantial compliance required.

(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, if the agency prepares:

- (a) A statement of its findings that its failure to act promptly will result in serious prejudice to the public interest or the interest of the parties concerned and the specific reasons for its findings of prejudice;
  - (b) A citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule;
  - (c) A statement of the need for the rule and a statement of how the rule is intended to meet the need;
  - (d) A list of the principal documents, reports or studies, if any, prepared by or relied upon by the agency in considering the need for and in preparing the rule, and a statement of the location at which those documents are available for public inspection; and
  - (e) For an agency specified in ORS 183.530, a housing cost impact statement as defined in ORS 183.534.
- (6)(a) A rule adopted, amended or suspended under subsection (5) of this section is temporary and may be effective for a period of not longer than 180 days. The adoption of a rule under this subsection does not preclude the subsequent adoption of an identical rule under subsections (1) to (4) of this section.

Motion: To approve the temporary rulemaking as recommended.

Motion to approve Jack Loacker  
Second the motion Nan Garnick  
All in favor

Mark: the temporary rules passes.

Steve: asked if there will be any ramification or results from these temporary rules. Gregg said no; these temporary rules will conform current select agency business practices to the requirements of OAR.

Mark: The adoption of these temporary rules will address business practices, which presently, technically are illegal since they do not conform to existing administrative rule. Since we are conforming the temporary rules to existing business practice, it will be business as usual, but it will be done on a legitimate basis.

The group discussed the Aurora Master Advisory Plan public advisory committee. The board briefly discussed the list of members. It is thought to be a diverse group of advisors.

Chris Cummings emailed a list of prospective advisory committee members this morning to board members, persons who were interested and had applied, along with Chris and

Gregg's proposed list of members. There appears to be quite a variety of stakeholders included.

No action required by the committee for the Aurora Master Plan Advisory committee.

Mark: - Information items

**Waldo Lake:** It comes to ODA's attention from the State Marine Board is acting to amend rules to no longer allow gasoline powered engines and only allow electric motors. This will preclude the use of this lake by seaplanes under other than emergency situations. At this time it is believed after speaking with Department of Administrative Services (DAS) and Department of Justice (DOJ) that the ODA need not be involved in this hearing.

**Mulino Airport Hangars:** It has been determined the older hangars at the Mulino State Airport are no longer structurally sound and are not economically restorable, it would not be cost-effective to provide substantial repairs as they are over 50 years old. They are to be demolished and a notice has gone out to the current tenants.

Gregg explained there are 15 tenants that are being evicted who are currently paying \$125 per month. The new hangars are \$275 per month if paid 12 months in advance and there are 16 available for lease. Six of the current tenants being displaced have already reserved six of the new hangars to lease.

At this time ODA has no funds to develop this site. The agency has had two offers from contractors who are interested in developing this property on their "dime" to demolish, and with one interested party offering to build new hangars at their expense, with a 30 year ground lease. They also propose to purchase the new hangars owned by ODA so as to become the provider of hangar rentals at the site, relieving ODA of the responsibility.

There was discussion on the new hangars and the \$275 per month lease amount being substantially higher than the older wooden hangars. Is this reasonable? This is believed to be a reasonable path forward to explore. No action required by the committee for the Mulino State Airport Hangars.

Gregg informed the board regarding the 2007 Aurora appraisal. The firm who provided the appraisal in 2007 advised Gregg "that the firm did not appraise the value of land that is subject to the TLM holding leases." He said that they advised him they were asked to provide an appraisal for "property on which a hangar is or could be built".

The next OAB meeting will be February 25, 2010, from 10 a.m. to 4 p.m. at the Public Utilities Commission Building located at the corner of Marion and Capitol Streets, Salem, in the large hearing room.

Mark has been in contact with DAS Human Resource Department regarding the hiring of a new ODA Director. He informs the group there is a good pool of candidates and he will be meeting with Human Resources to review applicants.

Meeting adjourned at 2:35 p.m.

attachments (3)

- Justification for temporary rules
- Copy of temporary rules
- List of proposed membership for the Aurora Master Plan advisory committee

Approved teleconference minutes Jan. 7, 2010

GD/rs

**INDEX TO EXCERPTS OF RECORD  
FOR PETITIONERS' OPENING BRIEF**

<b>Agency Index No.</b>	<b>Rec. Page No.</b>	<b>Date</b>	<b>Item Description</b>	<b>ER No.</b>
A-4	10-13	01/14/2010	Excerpts from Meeting Minutes, Oregon State Marine Board Meeting	ER-1 – ER-4
A-5	17-24, 29-32	01/06/2010	Excerpts from Final OSMB Staff Report: Item B: Rulemaking to Boat Operation on Certain Waters in Lane County; Proposal to Ban the Use of All Motorboats and Floatplanes on Waldo Lake, including signed Memorandum of Understanding	ER-5 – ER-16
A-9	55-58	10/13/2009	Excerpts from Meeting Minutes, Oregon State Marine Board Meeting	ER-17 – ER-20
A-10	64-66	10/05/2009	Item B: Rulemaking to Boat Operation on Certain Waters in Lane County; Proposal to Ban the Use of All Motorboats and Floatplanes on Waldo Lake	ER-21 – ER-23
D-155	2180- 2182	09/30/2009	Excerpts from Correspondence about Memorandum of Understanding	ER-24 – ER-26

D-157	2196-2197	08/19/2009	Correspondence about Waldo Lake	ER-27 – ER-28
N/A	N/A	09/27/2011	Stipulated Supplement to Rulemaking Record	ER-29 – ER-34

THESE MINUTES WERE APPROVED BY THE BOARD W/O CORRECTION ON 04/28/2010



Meeting Minutes  
Oregon State Marine Board Meeting  
January 14, 2010  
Portland, Oregon

Chair Trey Carskadon called the January meeting of the Oregon State Marine Board to order at 9:00 am.

Board Members present: Rick Allen, Brian Carroll, Trey Carskadon, Deborah McQueen and George Tinker

Staff Present: Director Paul Donheffner, Randy Henry, Wayne Shuyler, William Rydbloom, Ashley Massey, Marty Law, Janess Eilers, Hillery Crew and June LeTarte

**Board Minutes Approval:**

Chair Carskadon asked for review and approval of the October 13, 2009 Marine Board meeting minutes. Ms. McQueen motioned approval. Mr. Carroll seconded. Motion carried unanimously.

**Unscheduled Testimony on Non-Agenda Items:** None

**Item A: City of Portland, Office of Healthy Working Rivers**

Ann Bejer, Director, Office of Healthy Working Rivers, City of Portland, addressed the Board. The office was created in 2009 with the mission to foster economic development, environmental health and community involvement. The city is committed to providing access, particularly on the Willamette River for boating, both motorized and non-motorized craft. The office is involved in the River Safety Taskforce, along with OSMB, county sheriff, fire bureau and US Coast Guard, to ensure a coordinated response and minimize conflicts on the river.

Chair Carskadon remarked the city and the Marine Board need to work collaboratively to outline a long-term vision, a formal policy for river use for both non-motorized and motorized users on the Willamette River. The river connects many cities and he thinks there is a willingness within the city governments to work together on a broader-use plan on the river. Ms. Bejer concurred.

**Item B: Rulemaking on Boat Operations on Certain Waters in Lane County OAR 250-020-0021: proposal to ban the use of all motorboats and floatplanes on Waldo Lake.**

Director Donheffner shared highlights from the staff report. The entire report will be entered into the record. The letter received from Representative Whisnant and Representative Stiegler asking the Board to delay rulemaking action was distributed to Board members.

The US Forest Service, Plan #47, was ruled "arbitrary and capricious" by the court and set-aside. Waldo Lake is a state scenic waterway, administered by Oregon State Parks and Recreation, to prevent shoreline development and hydroelectric development.

There is no evidence to suggest that this rule is necessary for boating safety under the Board's authority to regulate. The 2008 statewide boating survey documented 758 days of use by registered boats for the entire year. The Board has the authority to protect water quality; the water quality in Waldo Lake is outstanding.

This administrative rule will fulfill the goal of creating an unimpaired natural outdoor recreation-social experience. The catalyst for the rulemaking is a MOU between the Forest Service, State Lands and OSMB, crafted by the Attorney General's office at the request of the Governor's office.

Two public hearings were conducted. A summary of the public and written comments is included in the staff report.

Legal concerns raised: Board has no authority to adopt rule; the Board lacks authority to enter into MOU with the Forest Service; the rulemaking process was flawed; consultation with the Aviation Board needed; and persons with disabilities would be prohibited access. Our Assistant Attorney General responded to these concerns. The public suggested several compromises but it was concluded that they would not be consistent with the recommended rule.

Staff presented the following recommendations:

Adopt rule language for Division 020: Use of internal combustion motors in boats and floatplanes operation on the surface of Waldo Lake is prohibited year-round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake.

File a temporary rule for Division 030 to incorporate the identical Waldo Lake language in Division 020.

File notice to initiate permanent rulemaking without a hearing for Division 030.

Chair Carskadon opened Board discussion.

Mr. Allen questioned whether the Board may change Oregon Revised Statutes regarding the 10-mile per hour law. Director Donheffner responded staff was advised by our Assistant Attorney General that the Board can be more restrictive than the Legislature in this matter.

Chair Carskadon requested Director Donheffner read the rule language into the record. Director Donheffner complied.

Mr. Allen questioned if the MOU was court ordered and whether there was a time constraint involved. Did the MOU have to be signed prior to the Board initiating the public hearing process.

Director Donheffner responded that there was no court order. The work on the MOU began in August 2009 and was finalized the end of October. The Board initialed rulemaking at its October 2009 meeting.

Mr. Allen questioned why the MOU had to be signed at that specific time and who wrote it. Director Donheffner responded the MOU was drafted by our Assistant Attorney General, Jas Adams. Mr. Allen asked if this was done at Director Donheffner's request. Director Donheffner responded no; it was completed at the request of the Governor's office.

Mr. Tinker asked where the use of electric motors stands. Director Donheffner responded that the rule addresses internal combustion motors only, electric motors are allowed.

Ms. McQueen questioned if a boater could still launch with an internal motor on board and just not use it but then if a sailboat got into trouble, could they use their motor. Director Donheffner repeated the rule prohibits the use of the internal combustion motor and there is no provision for emergency use.

Mr. Allen questioned if the concern was pollution and noise, was the 4-stroke motor option looked at as an alternative. Director Donheffner responded staff had advocated for 4-stroke engines with the Forest Service for the past ten years.

Mr. Allen questioned the Director. Since he was instructed to sign the MOU, would he come to the Board with a recommendation stating otherwise. Director Donheffner responded, no.

Mr. Allen expounded that because of the MOU, the staff recommendation had to be motors be banned, making the decision pre-determined. Director Donheffner had no response.

Mr. Allen stated that while it may be hard to respond to, it is a fact. That's why he had asked about the 4-stroke motors. Normally, these issues are weighed by the pros and cons but in this case because of the MOU, the decision was boxed-in. So whether or not 4-stroke motors might have been an acceptable alternative, it couldn't be recommended by staff because the MOU had already been signed.



Director Donheffner said he could not recall in the past 25 years where the agency signed an MOU to initiate rulemaking. Though, a somewhat similar comparison maybe the external documents prepared to narrow the scope of the rulemaking prior to the adoption of the Deschutes River Plan.

Mr. Allen asked if the Board is bound by this MOU. The public hearings were held in front of staff, a summary of the hearings is presented by staff and then staff makes a recommendation. This is no way to set policy, law and to affective the public's rights in this state. This is why the public is fed-up. We signed a MOU, with no court order or time constraint, which pre-determines the outcome that staff has to give us. Members of the public spent time, energy, money and effort to comment during the hearing process and we are presented with a pre-determined outcome. This is pretty pathetic. When we pass this, it's unbelievable.

Director Donheffner commented that some members of the public made the same observation during the hearings.

Chair Carskadon called for a motion.

Mr. Carroll made a motion to adopt all three staff recommendations: adoption of 250-020-0221, adoption of temporary rule 250-030-0030, and initiation of permanent rulemaking for 250-030-0030.

Mr. Tinker seconded the motion.

Chair Carskadon started the discussion by stating that this is very difficult for the Board. This is the intersection of politics and our charge as Board members. It has been made very clear to him that the Board serves at the pleasure of the Governor. The Governor's Office has made it abundantly clear, how they would like to see this issue go. It's not what he signed-up for but its reality.

Ms. McQueen concurred. It has been made very clear that we serve at the pleasure of the Governor. However, may have been appointed to this position, but sure hopes it wasn't to be a bobble-head. Maybe Pollyanna-ish but believes she serves at the pleasure of the boater, whose money and rights we are suppose to be protecting. Doesn't believe it's the government's responsibility to take rights but rather to protect the rights. This is going against what the legislature has already set-out as a protection. It shouldn't be her job to be a social-issue referee. Doesn't like how this has gone down. Feel sorry for staff, certainly the Director, we are in a political mess. When the boss says make it happen, you can say no and leave but then what. Nobody likes this. The democratic process has failed in this instance but the public shouldn't throw up their hands and give-up on the process.

Mr. Tinker questioned why, within the rule language, the Marine Board wasn't included in the "previous approval" requirement as was the Willamette National Forest Supervisor. This issue is tough to swallow. Not proud of where we are at right now. Hope to be able to stay on the Board to make improvements that will be beneficial to boaters. Need to protect the agency, its integrity, as the agency is held in high regard in the state. This vote represents a low moment.

Mr. Carroll echoed the sentiments of Board colleagues. Just appointed in July, believing he could weigh the issues and come to fair conclusions but feels he has been placed in a box on this issue. In my past twenty-five years working in government, have never worked with an agency of higher integrity, which makes this decision so difficult. Whether one agrees or not, this issue has been clouded. There was not a fair assessment given, regardless of what side one is on. It's a tragedy of the democratic process. This has been very difficult, but in the future, maybe we will be able to maintain the integrity and quality the agency has always had.

Mr. Allen added that this issue should have been allowed a debate and given a fair shake. The public must believe that the agency will analyze issues on merit, this tramples on the process. This is too bad because maybe we should be banning motors on Waldo Lake. He will support the ban, in support of the agency.

Mr. Carroll stated hopefully, in the future the Board is not put in this position and that we will be able to give a fair assessment to issues.

Mr. Allen stated he is afraid that this is a trend. We had outside pressure up on the Willamette and also the Holgate/Ross Island issue. We voted and then two months later – we change the vote – and now this. In the past six-eight months we have had a lot of political pressure from the Governor's office, legislatures and others into the rulemaking process.

Mr. Carroll voiced concern that if people are continually put into situations like this; quality people will not want to serve on committees and Boards. Didn't sign-up to be a puppet for someone else.

Chair Carskadon concluded, than in the past six years that he has served on this Board, we have been outspoken and have pushed-back when we needed to. With checks and balance, there are other governmental processes that can address this issue. Don't get disheartened. To be fair to the Governor, his vision of Waldo Lake is a pristine, non-motorized, sanctuary. This issue has been percolating for fifteen years. This is his vision of how he wants to leave his office, the state, and he is very clear on what he would like to see of this Board.

Chair Carskadon called for a vote.

Roll Call:

In favor: Mr. Carskadon, Mr. Tinker, Mr. Carroll and Mr. Allen

Opposed: Ms. McQueen

Motion passed.

**Item C: Rulemaking on Personal Floatation Device Statewide Rule OAR 250-010-0154**

William Rydblom, Law Enforcement Manager, briefed the Board. HB 2079 requires PFD wear when boating in Class III whitewater. The rule language is modeled after OAR 250-016-0012, for commercial outfitters. Public education is needed throughout 2010 and it's recommended that officers only cite for egregious violations.

Staff presented the recommendation as outlined in the staff report.

Mr. Tinker motioned approval. Mr. Carroll seconded. Motion passed unanimously.

Mr. Allen questioned who is going to decide the class of the river. Education is needed. Director Donheffner responded that marine officers will need to be able to articulate the attributes of the river and justify their decisions.

Ms. McQueen questioned whether signs have been posted. Mr. Allen said there are no signs. Rapids change. The state is taking away personal responsibility.

Director Donheffner stated the agency will work with our partners to post notices and educate the public.

**Item D: Rulemaking on Boat Operations in Linn County OAR 250-020-0240**

Randy Henry, Operations Policy Analyst, briefed the Board. The Marine Board received a formal request from the City of Lebanon for an electric motor only rule for Cheadle Lake.

Staff presented the recommendation as outlined in the staff report.

Mr. Allen motioned approval. Mr. Carroll seconded. Motion passed unanimously.

**Item E: Rulemaking on Boat Operations on the Willamette River in Clackamas County**

This item was tabled.

January 6, 2010

Item B: Rulemaking on Boat Operations on Certain Waters in Lane County OAR 250-020-0221; proposal to ban the use of all motorboats and floatplanes on Waldo Lake.

Temporary rule amendment to adopt identical Waldo Lake rule language in Division 30 rules, Initiation of Notice to make Division 30 changes permanent.

Background:

- .01 On April 16, 2007 the Willamette National Forest announced its decision on Forest Plan Amendment No. 47, which prohibited the use of motorboats and floatplanes on Waldo Lake.
- .02 The Marine Board and others filed administrative appeals of this decision. OSMB's appeal was filed on June 4, 2007. The appeal challenged the Forest Service's authority to regulate motorboats on a lake that is plainly navigable, especially given the history of cooperation between the Forest Service and the Marine Board in regulating boats on other waterbodies surrounded by national forestland.
- .03 OSMB's appeal of the Forest Service decision on Plan Amendment No. 47 was denied by the Forest Service on July 24, 2007.
- .04 Steven Stewart and the Columbia Seaplane Pilots Association (CSPA) also filed administrative appeals which were denied. Subsequently, they filed a lawsuit in Federal District Court (Eugene) against the Forest Service, challenging the authority of the Forest Service to regulate motorboats on Waldo.
- .05 On May 20, 2009, Magistrate Judge Thomas Coffin issued his findings and recommendations in favor of Mr. Stewart and the CSPA by finding that the Forest Service's decision on Amendment No. 47 was "arbitrary and capricious in that the agency failed to conduct a factual inquiry into whether Waldo Lake was navigable at the time the State of Oregon entered the Union but instead relied on an irrebutable presumption of non-navigability which is irrational."
- .06 On July 13, 2009 Judge Michael Hogan adopted the Findings and Recommendations as final. On July 28, Judge Hogan issued his Final Judgment, in which he ruled that the Forest Service's Decision Notice on Forest Plan Amendment No. 47 "is arbitrary, capricious, and unlawful, and is set aside". Those portions of Forest Plan Amendment No. 47 that prohibited motors and the use of floatplanes were voided.
- .07 There is interest in having the Marine Board adopt administrative rules to ban motors and floatplanes and thus achieve what the Forest Service tried but failed to accomplish.
- .08 According to the Forest Service, Waldo Lake is the 13<sup>th</sup> largest lake in Oregon. With a size of 6,298 surface acres, it is second only to Upper Klamath Lake among natural non-alkali lakes in the state. It is the second deepest lake after Crater Lake, with a maximum depth of 420 feet and a mean depth of 128 feet. It sits at an elevation of 5,414 feet.

- .09 On June 27, 2009 following the Federal Court decision, the Oregonian opined that motorboats should be banned on Waldo Lake. The Oregonian's preference was to have the Governor handle this administratively. A copy of the editorial is attached.
- .10 Waldo Lake is a state scenic waterway. ORS 390.805(3); 390.826(17). The policy underlying the Oregon Scenic Waterway Act as set forth in ORS 390.805 includes protection of the quality of outdoor recreation in the "natural setting" of Waldo Lake and other conservation values. ORS 390.845(1) provides that in the administration of state scenic waterways "primary emphasis shall be given to protecting the aesthetic, scenic, fish and wildlife, scientific and recreation features, based on the special attributes of each area." ORS 390.845(2)(a) provides that "All permissible roads, railroads and utilities shall be located in such a manner as to minimize the disturbance of the natural beauty of a scenic waterway." ORS 390.855(3) provides as one criterion for adding additional scenic waterways that "the river or segment of river and its setting are large enough to sustain substantial recreation use and to accommodate existing uses without undue impairment of the natural values of the resource or quality of the recreation experience."

Need and Justification for Rule:

- .01 Because the Forest Service failed in its efforts to ban motorboats and floatplanes, motors can still be used on this state scenic lake. Many persons who use the nearby Waldo Wilderness area, and visitors to Waldo Lake would prefer to paddle or hike without the intrusion of the noise of motorized boats or occasional floatplanes. Motors are contrary to the type of outdoor recreational experience in a natural scenic waterway setting that many seek to create for this area.
- .02 The 2008 statewide boating survey documented 758 days of use by registered boats for the entire year. 180 days were reported as fishing trips, 508 sailing days, and 69 were cruising. For a lake this size, this is extremely low use, even with a short 150 day summer/fall season. Congestion is not an issue. Sailboats that use auxiliary motors for brief periods to maneuver in and out of the launch ramps are the primary source of motorized use. Most of their time spend is under sail. This use will be eliminated, so only small day sailboats like Hobie cats or similar small sail craft that don't require auxiliary power will be allowed. Paddling will remain the predominant use, as it is today, but without any possible adverse impacts to the quality of the outdoor recreational experience in a natural setting and scenic waterway caused by motorboats on Waldo Lake.
- .03 The Forest Service wishes to manage the area as a pristine, primitive area, much like the adjacent Waldo Wilderness. In creating the Waldo Wilderness area, Congress did not include the shoreline in wilderness and specifically prohibited the Forest Service from creating a wilderness buffer on the lake to shield visitors within the Wilderness Area boundaries from activities outside the designated Wilderness Area. However, that Congressional prohibition does not prevent the State of Oregon from administratively banning motors on a state scenic waterway in order to preserve the natural setting of Waldo Lake, minimize disturbance of the natural beauty of Waldo Lake, protect aesthetics, and provide an unimpaired natural quality of recreational experience. The proposed rule does not purport to create a buffer zone or to create a de facto wilderness

area to protect those within the Wilderness Area from sights and sounds outside the Wilderness Area. The impact of motorized boats of concern to the Marine Board is not on those within the designated wilderness area but on other boaters on the lake itself and on the shore, which are outside the designated wilderness area.

- .04 If motors are banned on Waldo Lake, it will become the largest non-motorized lake in Oregon. It will join other natural primitive lake settings such as Yellowstone Lake, lakes in the Boundary Waters Wilderness/Quetico Provincial Park in Minnesota and Ontario, and remote lakes in Alaska.
- .05 There is no evidence to suggest that this rule is necessary for boating safety. The extremely low use numbers and existing 10 MPH speed limit virtually eliminate the potential for accidents due to speed or collision. The 10 MPH speed limit was created by the Oregon Legislature in 1967 to prevent high speed traffic. We have no information which suggests that boating safety or traffic congestion is an issue.
- .06 The water quality in Waldo Lake is outstanding. It is one of the cleanest, purest lakes in the state. The Forest Service recognized this outstanding water quality in Forest Plan Amendment No. 47. However, efforts by the Forest Service to document water pollution from motorboats or floatplanes failed to find any evidence of water quality impacts due to extremely low levels of motorized use. We are not aware of any studies that link the existing low level of motorboat use with adverse impacts to water quality. The lake is closed by snow and weather to all boating most of the year. An alternative to allow only clean low emission 4 stroke engines with a horsepower cap was offered by agency staff to the Forest Service during our participation in the federal planning process. This alternative was rejected by the Forest Service because it would not achieve a motor free lake, which was the desired outdoor recreation setting the Forest Service sought in its plan.
- .07 While the Marine Board cannot regulate floatplanes while in flight, and must regulate floatplanes in cooperation with the State Aviation Board, a prohibition on all motorboats will effectively prevent floatplanes from taxiing or otherwise navigating on the lake when not in flight. An exemption to allow emergency landings would be included. Obviously, in a true emergency a pilot will attempt a safe landing regardless of our administrative rules. We have no data on the frequency of float plane traffic. Forest Plan Amendment No. 47 did not document float plane numbers or complaints.
- .08 The Forest Service wanted to allow electric motors under Forest Plan Amendment No. 47. Because of its large size, and potential for windy conditions, an electric motor might be of limited use and could increase risk. Most electric motors are not capable of travelling across this lake and back without carrying multiple batteries. Electric motors will not accommodate large sailboat users. On the other hand, allowing electric motors would allow disabled boaters who cannot manually paddle or row boats to be able to experience boating on Waldo Lake.
- .09 This administrative rule will fulfill the goal of creating an unimpaired natural outdoor recreation experience in a scenic waterway. The catalyst for initiating this rulemaking proceeding is a Memorandum of Understanding between the Forest Service, and the directors of the Department of State Lands and the Oregon State Marine Board, in which

the Executive Director of the Marine Board agreed to propose to the Marine Board an administrative rule to achieve a ban of motorboats on Waldo Lake. The MOU was negotiated with the Forest Service at the request of the Governor's Office.

- .10 Waldo Lake was added to the State Scenic Waterway System in 1989. This system is, administered by Oregon State Parks. It is the only lake in the system. The scenic waterway system was created to prohibit hydroelectric developments, impoundments and shoreline development which would detract from the natural scenic setting of these waterways. Waldo Lake was added to prevent any development of dams or diversions that would impact the lake. The Board has the authority to regulate boating on scenic waterways. ORS 390.845(1) provides that in the administration of state scenic waterways "primary emphasis shall be given to protecting the aesthetic, scenic, fish and wildlife, scientific and recreation features, based on the special attributes of each area."
- .11 The existing statewide exemption for official use (OAR 250-020-0005(1)) on waters closed to motors, which would allow Forest Service or other government vessels to operate with motors, was not deemed acceptable to the Forest Service, which preferred to be able to give prior authorization for official use. A compromise to allow official use for search and rescue, law enforcement and fire suppression without prior Forest Service approval was agreed upon in the MOU and is reflected in the final rule language.
- .12 ORS 830.185(2) imposes a 10 mph speed limit on motorboats on Waldo Lake: "(2) No person shall operate a boat with an outboard or inboard motor at a speed in excess of 10 miles per hour on the following named waters of this state located in the counties named: \* \* \* Lane[:] Waldo Lake." Official use for search and rescue, law enforcement and fire suppression is allowed in the proposed rule, and other governmental use is allowed upon approval by the Willamette National Forest Supervisor. Although there is an existing official use exception in Oregon statute to prohibitions of motorboats, under ORS 830.180(1), there is no exception to the 10 mph speed limit on Waldo Lake for official use. Given the lack of an official use exception to the 10 mph statutory speed limit on Waldo Lake, the statutory 10 mph speed limit will still have applicability for the official motorboat use that would be allowed after the proposed rule is adopted.
- .13 The purpose of the rule is to preserve the natural setting of Waldo Lake, minimize disturbance of the natural beauty of Waldo Lake, protect aesthetics, and provide an unimpaired quality of recreational experience for people.

#### Prior Actions

- .01 The Board opened this rule project at its October 13, 2009 Board meeting.
- .02 On November 5, 2009 the MOU between the State of Oregon and the U.S. Forest Service was finalized. The MOU sets forth the process of initiating rules and the recommended rule language.

## Summary of Public Comments

OSMB filed notice with the Secretary of State for rulemaking on Waldo Lake in Lane County. The public comment period was November 1, 2009 through December 15, 2009. During this period, two public hearings were held.

### Public Hearings:

At the Eugene hearing, 36 individuals signed the attendance roster. Twenty-six (26) people spoke in favor of adopting the proposed rule language to prohibit the use of internal combustion motors in boats and floatplanes on Waldo Lake. Eight (8) people spoke in opposition.

At the Bend hearing, twenty-five (25) people signed the attendance roster. Four (4) people spoke in favor of adopting the rule language. Twenty-one (21) people spoke in opposition.

### Written testimony:

Eighty (80) people wrote the Marine Board in **support** of the proposed prohibition. Twenty-four (24) people wrote in **opposition**.

### E-Mail:

There were 524 individual e-mails received **supporting** the proposed prohibition, and one identical copied email that was sent 430 times. There were 108 e-mails sent in **opposition** to the proposed prohibition.

### Rationale:

The reasons given in public testimony at the hearings mirrored those received by US mail and by e-mail.

The reasons most cited for adoption of the proposed rule language to prohibit the use of internal combustion motors in boats and floatplanes on Waldo Lake were:

- Protection from water pollution from internal combustion engines – pristine body of water.
- Protect the lake for future generations.
- Elimination of engine noise.
- Spiritual sanctuary.
- Unique recreational opportunity for paddlers.
- Many statewide opportunities for motorized boaters elsewhere.

The reasons most cited for not adopting the proposed prohibition rule language were:

- Lack of water pollution – clarity of the lake.
- No issue of public safety, conflict or water quality and no requests for rules by ODFW.
- Rule unfairly limits access to one group of users only.
- Safety concerns for sailboat operators without motors.
- No documented basis to outlaw seaplanes for safety, environmental, or other reasons.

Several legal concerns were also raised:

- The Board has no authority to adopt rule.
- The Board lacks the authority to enter into a MOU with the Forest Service.
- The rulemaking process and rule documents are flawed.
- The rules for floatplane operation should be made in consultation with the State Aviation Board.
- Persons with disabilities would not have access.

Responses to foregoing legal concerns:

The comments challenging the Marine Board's authority to adopt this rule overlook the authority conferred on the Marine Board by the second part of ORS 830.175(3), which allows the OSMB to prohibit motorboat use on scenic waterways: "The board may make special regulations relating to the operation of boats, including the establishment of designated speeds and prohibition of the use of motorboats \* \* \* for carrying out the provisions of the \* \* \* the Oregon Scenic Waterways Act, ORS 390.805 to 390.925."

It is not outside the authority of the Marine Board for its Executive Director to enter into a Memorandum of Understanding with the US Forest Service setting forth the rule language that the Executive Director agreed to propose to the Board of the Marine Board.

The MOU did not predetermine the rulemaking for the Marine Board; it predetermined only the rule language that the Executive Director of the Marine Board agreed to propose to the Board.

ORS 830.110(19) gives the Marine Board the authority to regulate seaplanes to achieve the purposes of ORS 830.175: "In addition to the powers and duties otherwise provided in this chapter, the State Marine Board shall have the power and duty to: \* \* \* For purposes of ORS 830.175, 830.180, 830.185 and 830.195, in cooperation with the State Aviation Board, regulate boats that are seaplanes as provided in ORS 830.605 and 835.200." OAR 738-040-0018 is a State Aviation Board administrative rule that provides that lakes closed to motorboats by Marine Board rule are *automatically* declared to be closed to seaplanes: "Except in an emergency, seaplanes shall not land, takeoff or operate on the following waters: \* \* \* (2) Those waters listed in ORS 830.180 and in State Marine Board rules, OAR Chapter 250, Division 20, where motors are prohibited or that allow electric motors only." This Aviation Board rule demonstrates that the Aviation Board has already cooperated with the Marine Board in adopting that rule. If the Marine Board adopts the proposed rule banning motorboats on Waldo Lake, the Aviation Board's rule provides that the lake will automatically be closed to seaplanes, except for emergencies. The proposed Marine Board rule would allow official use of seaplanes on Waldo Lake for search and rescue, fire suppression and law enforcement, without prior approval by the US Forest Service. Hence, the necessary cooperation between the two boards is already in place, as reflected in the Aviation Board's rule.

In 2007, the US DOJ Civil Rights Division rejected a civil rights complaint based on the refusal of the Marine Board to allow disabled persons to use an electric motor on a motor-prohibited lake. The US DOJ determination, a copy of which is attached, noted that 28 CFR § 35.130(b)(7) requires that a state agency must make reasonable modifications to programs necessary to provide equal access or to avoid discrimination against disabled persons. The US DOJ also emphasized that 43 CFR § 17.217 requires only that programs be accessible "when viewed in



their entirety." The US DOJ noted that only 1% of Oregon waterbodies were closed to all motor boats, that there were 43 designated electric motor boat lakes scattered around Oregon, and hence that the Marine Board's boating program, when viewed in its entirety, was accessible to disabled boaters.

By extrapolation of the reasoning employed by the US DOJ in its 2007 determination, there are thousands of lakes in Oregon that are open to motorboats and hence are accessible to disabled persons who use motorized boats for recreational purposes. When viewed in its entirety, the OSMB's boating program is sufficiently accessible to motorboats and disabled boaters around the state.

#### **Compromises suggested by the public:**

##### **1. Seaplane exemption requested.**

RESPONSE: It would not be consistent with the purpose of the proposed rule – to preserve the natural setting of Waldo Lake, minimize disturbance of the natural beauty of Waldo Lake, protect aesthetics, and provide an unimpaired quality of recreational experience – to allow motorized aircraft to use the lake but not motorized boats. A consultation with the State Aviation Department was completed January 5, 2010 and confirmed that under Aviation's administrative rule OAR 738-040-0018 floatplanes are automatically prohibited on lakes closed to motorboats, so no further action is required once the Marine Board adopts this rule.

##### **2. Adopt a rule allowing 4-stroke engines with a strict horsepower limit so sailboats can continue use. Adopt a use plan similar to the Yellowstone National Park Plan and the Lake Tahoe Plan.**

RESPONSE: Although 4 stroke engines are cleaner and quieter than 2 stroke engines, this compromise would not entirely eliminate noise complaints. Moreover, allowing any type of internal combustion motors would not be consistent with the purpose of the proposed rule: to preserve the natural setting of Waldo Lake, minimize disturbance of the natural beauty of Waldo Lake, protect aesthetics, and provide an unimpaired quality of recreational experience.

#### **Other significant comments:**

- The Willamette National Forest Service supports the proposed language. 12/4/09 letter.
- December 10, 2009: A complaint was filed with the Disability Rights Section of the Civil Rights Division, Washington, DC concerning the proposed rule as it would limit access to persons with physical ailments and handicaps.
- The Oregon Department of Aviation requested the Board to suspend the rule project pending a consultation over float planes. As noted above, a consultation with the State Aviation Department was completed January 5, 2010.
- No other agencies went on record for or against the proposed rule. No comments were received from DEQ, ODFW, State Parks (which administers Scenic Waterways), or other state agencies.

It is clear from the testimony at the hearings and from the comments received that all of the users of Waldo Lake value it for much the same reasons: its scenic beauty, peaceful setting, clear

waters and the outdoor recreation values it provides. Supporters and opponents of the rule all love the lake.

Perhaps the largest user group that will be adversely impacted by the rule are sailboat users, who typically use a motor for mobility launching or docking, or when the wind doesn't cooperate. Most of those users can find other lakes in Oregon where motorboats are allowed. However, they will not have access to the recreation experience that is unique to Waldo Lake.

#### Recommendations:

- .01 That the Board adopt the rules set forth below, effective immediately upon filing. A copy of the full rule language is attached.

#### OAR 250-020-0221 Boat Operations on Certain Waters in Lane County

Delete 3 [(a) Waldo Lake], and renumber b,c,d to a,b,c. This removes reference to the existing 5 MPH slow no wake rule near docks on Waldo, since without motors it is a rule that has no purpose.

#### Add New:

- (10) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year-round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake.

Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

#####

- .02 That the Board adopt a temporary rule, effective upon filing, to amend OAR 250-30-0030 (3)(h) to replace the current 10 MPH and Slow No Wake references in Division 30-0030 (3)(h) with language that incorporates the **identical** new Waldo Lake language found above in 250-020-0221 (10). This will ensure rule consistency between Division 20 and 30.

- .03 That the Board file notice to initiate permanent rulemaking to make this temporary rule in Division 30 a permanent rule, without public hearing, since it is **identical** to the new Division 20 Waldo Lake rule. This will make the consistency permanent.

#####

## MEMORANDUM OF UNDERSTANDING

### **Between the Oregon Department of State Lands and the Oregon State Marine Board, and the United States Forest Service, U.S. Department of Agriculture, Regarding Management of Watercraft Operation on the Surface of Waldo Lake**

#### **1. Purpose**

The State of Oregon Department of State Lands and Oregon State Marine Board (Oregon) and the United States Forest Service (Forest Service) enter into this Memorandum of Understanding (MOU) for the purpose of achieving consistency related to the operation of boats and floatplanes on the surface of Waldo Lake.

Oregon has asserted that Waldo Lake is a navigable state waterway and that the Oregon State Land Board has a proprietary interest in the beds and the banks of Waldo Lake and the column of water above the bed and banks, and that the Oregon State Marine Board controls navigation and operation of boats and floatplanes on the surface of Waldo Lake.

The Forest Service has asserted that it manages and regulates recreational uses of Waldo Lake under its authority to manage national forests and the lands and waters contained therein, including regulation of the use of vessels and motorized machinery to achieve and protect the recreational experiences prescribed in the Forest Management Plan for the Willamette National Forest.

Without conceding any claims of respective ownership, jurisdiction or authority to manage the surface of Waldo Lake, Oregon and the Forest Service enter into this MOU in order to agree to the management of operation of boats and floatplanes on the surface of Waldo Lake under the standards set forth in Section 2 of this MOU.

#### **2. Standards for Public Use of Waldo Lake**

Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year-round.

"Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake.

Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire

suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

### **3. Responsibilities**

Oregon and the Forest Service agree, to the extent practicable, that the parties will collaborate to implement and enforce the standards set forth in Section 2 of this MOU. Oregon will initiate administrative rulemaking with the goal of adopting the standards set forth in Section 2 of this MOU.

### **4. Relationship with Other Agreements, and Limitations**

Oregon and the Forest Service agree that this MOU does not conflict with the March 1995 Memorandum of Understanding signed by the Executive Director of the Oregon State Marine Board, the Forest Service, and the United States Bureau of Land Management, entitled "Memorandum of Understanding Concerning the Management of Recreational Boating on Oregon State Waters and the Navigable Waters of the United States." (NFS-95-06-59-14). A copy of the 1995 Memorandum of Understanding is attached to this MOU.

Nothing contained in this MOU is intended to supersede any existing agreements. No aspect of this MOU shall be construed as waiving or relinquishing any legal rights held by either Oregon or the Forest Service. This MOU is not intended to establish any property or ownership rights in Oregon or the Forest Service.

### **5. Amendments and Modifications**

Any changes or modifications to this MOU must be in writing and signed by all parties.

### **6. Points of Contact**

The designated point of contact for each signatory to this MOU shall be:

#### **Oregon State Marine Board:**

Paul Donheffner  
435 Commercial St NE #400  
Salem, OR 97309-5065

**Oregon Department of State Lands:**

Louise Solliday  
775 Summer St. NE, Suite 100  
Salem, OR 97301-1279

**United States Forest Service:**

Willamette National Forest  
211 East 7th Avenue  
Eugene, OR 97401

**7. Freedom of Information Act (FOIA) and Oregon Public Records Act.** Any information furnished to the Forest Service under this MOU is subject to the Freedom of Information Act (5 U.S.C. 552). Any information furnished to Oregon under this MOU is subject to the Oregon Public Records Act (ORS 192.410 – 192.505).

**8. Commencement/Expiration/Termination.** This MOU takes effect upon the signature of the Forest Service and Oregon and shall remain in effect for 10 years from the date of execution. This MOU may be extended or amended upon written request of either the Forest Service or Oregon and the subsequent written concurrence of the other(s). Either the Forest Service or Oregon may terminate this MOU with a 60-day written notice to the other(s).

**9. Responsibilities of Parties.** The Forest Service and Oregon and their respective agencies and offices will handle their own activities and utilize their own resources, including the expenditure of their own funds, in implementing this MOU. The Forest Service and Oregon will carry out their separate activities in a coordinated and mutually beneficial manner.

**10. Non-Fund Obligating Document.** Nothing in this MOU shall obligate either the Forest Service or Oregon to obligate or transfer any funds. Specific work projects or activities that involve the transfer of funds, services, or property among the various agencies and offices of the Forest Service and Oregon will require execution of separate agreements and be contingent upon the availability of appropriated funds. Such activities must be independently authorized by the appropriate authority under applicable statutes. This MOU does not itself provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

Memorandum of Understanding re Waldo Lake  
US Forest Service, Oregon State Marine Board and Oregon Department of State Lands

11. **Establishment of Responsibility.** This MOU is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States or its agencies and officers, or against Oregon.

12. **Authorized Representatives.** By its signature below, each signatory certifies that the individuals listed in this document as representatives of the Forest Service or Oregon are authorized to act in their respective areas for matters related to this MOU.

IN WITNESS WHEREOF: Oregon and the Forest Service duly execute this Memorandum of Understanding in accordance with the terms and provisions contained herein.

**Oregon State Marine Board:**

Paul Donheffner  
Director  
Oregon State Marine Board

11/5/09  
Date

**Oregon State Department of Lands:**

Louise Solidary  
Director  
Oregon State Department of Lands

11/5/09  
Date

**United States Forest Service:**

Hamlet  
Regional Forester  
Pacific Northwest Region

10/30/09  
Date

*Meeting minutes are considered draft until approved by the Board at its next meeting.*



Meeting Minutes  
Oregon State Marine Board Meeting  
October 13, 2009  
Bend, Oregon

Chair Trey Carskadon called the October 2009 meeting of the Oregon State Marine Board to order at 9:03 am.

Board Members present: Rick Allen, Brian Carroll, Trey Carskadon, Deborah McQueen and George Tinker

Staff Present: Director Paul Donheffner, Randy Henry, Wayne Shuyler, William Rydblom, Ashley Massey, Dale Flowers and June LeTarte.

**Board Minutes Approval:**

Chair Carskadon asked for review and approval of the July 27, 2009 Marine Board meeting minutes. Mr. Allen motioned approval. Mr. Tinker seconded. Motion carried unanimously.

**Unscheduled Testimony on Non-Agenda Items:**

Mr. John Weigant, Portland, Oregon, addressed the Board on the need to implement sustainable boating in the state by adopting rulemaking that gives advantages to sailing, paddling, rowing and low-power boating. He asked the Board to consider shifting their promotion of power boating to that of sustainable boating.

**Item A: Possible Reconsideration of Proposed Rules for Boat Operations in Multnomah County. Proposed no-wake zone for Holgate Channel and Ross Island.**

Chair Carskadon voiced concern Board Members did not have an opportunity to fully discuss alternatives on the potential rules regarding Holgate Channel and Ross Island at the July 27 meeting.

Ms. McQueen, as a member who voted with the majority decision, made a motion to reconsider the staff proposal as presented at the July 27 Board meeting and reopen the discussion. Mr. Carroll seconded. Motion carried unanimously.

Mr. Tinker stated that he would like to allow the advisory group to conclude their work on mixed-use recommendations and direct staff to facilitate the group, or contract with an outside mediator, prior to re-voting on the issue.

Mr. Allen agreed with Mr. Tinker. Doesn't think it is a good idea to piece-meal the issue. Let the working group continue to work on a solution. Believes the Board is making a mistake by re-voting now. By not changing our decision at this time, it may bring the environmental groups to the table.

Mr. Tinker made a motion to take no action at this meeting and direct staff to take an active leadership with the working group or hire an outside facilitator. Motion died with no second.

Mr. Carroll agreed with Chair Carskadon that a slow-no-wake rulemaking in Ross Island Lagoon should have been considered by the Board as a separate issue. Believes there needs to be more discussion on the Holgate Channel issue.

Ms. McQueen agreed. It's a complicated issue, very emotional and very political. There is pressure from the Legislators and the Governor's office. Believes the Board can compromise on the lagoon and direct staff to facilitate a group to address the Holgate Channel rule issue. Ms. McQueen would be in favor of a motion to separate the two issues and re-voting on the lagoon decision today.

Mr. Allen disagreed. The Board should not be making a decision today and then forming a task force - after the Board has removed half the debate from the table. The working group should be addressing both issues and come back to the Board with recommendations. Mr. Tinker agreed. The Board shouldn't make a decision before the working group has the opportunity to come together with a final recommendation.

Mr. Carroll made a motion that Ross Island Lagoon shall be a slow-no-wake zone. He encouraged the parties to continue meeting, with facilitation, to bring resolution to the Holgate Channel issue.

Chair Carskadon directed staff provide the Board with an informational report in January and a conclusion and potential recommendation from the work group and possible rulemaking at the spring Board meeting.

Ms. McQueen seconded the motion.

Roll Call:

In favor: Mr. Carskadon, Mr. Tinker, Mr. Carroll and Ms. McQueen

Opposed: Mr. Allen

Motion passed.

Director Donheffner asked for clarification that the motion reflects the previous staff recommendation, including that commercial use and chase boats are exempt. Mr. Carroll responded that was his intention.

Ms. McQueen asked for verification that the chase boats are licensed. Director Donheffner replied the vessels are registered.

**Item B: Consideration of Rulemaking on Boat Operations on Certain Waters in Lane County. A proposal to ban the use of all motorboats and floatplanes on Waldo Lake.**

Steve Stewart addressed the Board. The Legislature approved a 10 mph speed limit on boat motors on Waldo Lake in 1967. The Board is now being ordered by the Governor to ban them. It may be arbitrary and capricious for the Board to usurp legislative directive. Paddle-challenged and safety conscious boaters are being discriminated against. Mr. Stewart asked the Board to schedule a public hearing on the issue.

Chris Gardner addressed the Board. He has sailed Waldo Lake for twenty years. Other sailors are here with him today. Mr. Gardner has two requests: 1) do not adopt and initiate this rulemaking. There is no evidence of any pollution due to motors; and 2) if the Board plans to move forward with the intention of protecting a pristine resource, ban all use from the water, including kayakers, canoers and swimmers. A big risk to Waldo Lake is from the developed campgrounds especially from the children. To identify and exclude one group and call the lake "protected" is false. Mr. Gardner asked the Board to schedule a public hearing.

Chair Carskadon replied there will be public hearings scheduled and he would hope that all constituent groups and stakeholders come forward to help identify different approaches, and to discuss the issue with their respective legislators, the Governor's office, and other interested parties.

George Tinker made a motion to initiate rulemaking with electric motors on Waldo Lake. Rick Allen seconded the motion. Mr. Allen would like to see the idea of allowing electric motors on Waldo Lake addressed during the hearing process.

Jack Pelham spoke before the Board. He has sailed on Waldo Lake for ten years. It's the second largest lake in the state. He believes a ban on motors will be risking people's lives. He has rescued many hikers, assisted the Forest Service in scuba dives and has assisted in putting out forest fires, all with his motor. It's a safety issue, due to the size of the waterbody.

Charles Mattox addressed the Board. He has sailed Waldo Lake since the early seventies. His idea is the whole east shore is open to the public camping; let the west shore be part of the wilderness area.



Chair Carskadon interrupted public comment and informed the audience that there will be an opportunity to address all ideas during the public hearing process. At this point, the Board is only authorizing the rule process to be initiated.

Mr. Allen requested more information on the issue of floatplanes utilizing Waldo Lake. Director Donheffner clarified that air craft in flight are planes. When a floatplane lands and is taxiing, it's considered a boat and has to abide by boating regulations. A prohibition of motors on the water surface would prohibit floatplanes from landing.

Chair Carskadon requested some historical background. What is the purpose of this rulemaking? What will be gained and lost by this rulemaking?

Director Donheffner responded that the staff report outlines the development of the Forest Service initiative, the subsequent court appeals, and court decision that ruled the Forest Service's decision was arbitrary and capricious. The need and justification of this rule is not a boating safety issue; there is a ten-mile speed limit currently in place, nor a water quality issue, but rather a social experience that the Forest Service would like to create; a water wilderness.

The Governor's Office has directed Director Donheffner to sign a Memorandum of Understanding (MOU) with the Forest Service. A copy of the MOU is in the Board package.

There is no latitude in this matter; the MOU binds the agency to the rule language outlined. The agency does have the discretion regarding the electric motor discussion. There are two versions of the rule outlined in the staff report, one allowing electric motors; the second would prohibit electric motors. The Board should advise staff which version they would like to put forward for public comment. Staff will schedule two public hearing: one in Eugene and one in Bend.

Mr. Allen asked whether Director Donheffner has signed the MOU. Director Donheffner replied he has been directed to do so. Mr. Allen asked why the agency is being asked to go out for public comment on rulemaking if the result of the process has already been decided. Director Donheffner responded that the MOU only sets the language standard for the rule.

Ms. McQueen questioned whether motors will be prohibited, no matter what the public wants? Director Donheffner stated that the Board still has to enact the rule.

Mr. Carroll questioned if the intent of the MOU is a non-motorized lake, and if the Board doesn't enact this rule, will be done anyway? Does this MOU preclude the Forest Service from coming forward to testify in front of the Board as to why they want to do this?

Director Donheffner responded that it puts the burden on the Board to enact the rule under the terms of the MOU. The Forest Service's reasons are probably similar to those in the Forest Plan Amendment #47; to create a social setting free of motors, a wilderness lake. The Forest Service may comment during the rulemaking process.

Mr. Allen asked whether the public is aware of this. What if the Board votes no? What if the Board refuses to adopt a rule and this document has been signed? Is there a ban?

There is no ban until the Board adopts the rule. Mr. Carroll asked if the MOU is non-binding without the rule. Director Donheffner responded he believes the Governors' office views it as binding.

Mr. Allen disagreed. It can't be both ways. The MOU is not binding until the language is put into rule. Unless the rule is adopted, the MOU has no affect.

Director Donheffner replied that the MOU does not enact the rule; rather it agrees to standards and states OSMB will enter into rulemaking.

Mr. Allen added that this MOU cannot vacate a law or a statute. Without a rule, anyone can run a motor on Waldo Lake.

Ms. McQueen questioned what jeopardy does this put the Board in from the Governor? Mr. Allen responded that the Governor can't legally adopt rules, the Board has to do so, but the Governor is telling the Board in the strongest terms what he wants done and what the results shall be.

Mr. Tinker asked if there could be changes to the MOU. When can it be revisited or modified? Director Donheffner responded that the MOU doesn't have a timeframe for change. The MOU will be signed; it will not wait for the rulemaking.

Mr. Tinker is disappointed that the Board is not meeting with the Forest Service. Ms. McQueen would like to go on the record that she is incredibly disappointed with this process, as the decision making is circumventing the Board and she was appointed by the Governor.

Roll Call:

In favor: Mr. Allen, Mr. Carroll, Mr. Carskadon and Mr. Tinker

Opposed: Ms. McQueen

Motion passed.

#### **Item C: Consideration of Rulemaking on the Aquatic Invasive Species Prevention Program**

Mr. Randy Henry, Operations Policy Analyst, briefed the Board. House Bill 2220 was passed creating an Aquatic Invasive Species Prevention Program. The bill provided OSMB with the authority to adopt rules for the implementation and administration of the act. The legislation established a \$5 surcharge on boat registrations, a \$5 annual permit fee on manually powered boats 10 feet or longer, and a \$20 annual permit fee for out-of-state power boats. This rule will become effective January 1, 2010, as directed by the 2009 Oregon Legislature.

Board discussion followed. Mr. Allen asked staff to make sure the "raft" is defined. Mr. Carroll requested staff to ensure that cities which own liveries be exempt. Staff responded that there is an exception in the rule for city and county owned boats.

Chair Carskadon instructed staff to get the word out. He has not heard or seen any public information. Mr. Henry reassured Chair Carskadon that the agency will launch an extensive outreach program beginning in the next few weeks.

Ms. McQueen made a motion to adopt the rule, as recommended. Mr. Carroll seconded. Motion passed unanimously.

#### **Item D1: Proposed Moratorium on New Administrative Rule Requests the Limit Public Access to the waters of this state.**

At the request of the Governor's office, Director Donheffner asked to withdraw this item from the agenda.

Chair Carskadon accepted staff's request. The proposed moratorium issue was extracted.

Rather than addressing the moratorium issue, Chair Carskadon suggested, instead, this would a good opportunity for the Board to discuss what they should be looking at when petitions are forwarded requesting limiting boating access.

Director Donheffner responded the criteria could include documented law enforcement safety issues; environmental problems supported by DEQ or of by another agency of expertise; and no net result of boating opportunities.

September 23, 2009 (REVISED 10/5/09)

Item B: Consideration of Rulemaking on Boat Operations on Certain Waters in Lane County; proposal to ban the use of all motorboats and floatplanes on Waldo Lake.

Background:

- .01 On April 16, 2007 the Willamette National Forest announced its decision on Forest Plan Amendment No. 47, which prohibited the use of motorboats and floatplanes on Waldo Lake.
- .02 The Marine Board and others filed administrative appeals of this decision. OSMB's appeal was filed on June 4, 2007. The appeal challenged the Forest Service's authority to regulate motorboats on a lake that is plainly navigable, and which has a 10 MPH speed limit that was imposed by the Oregon Legislature in 1967 (ORS 830.185).
- .03 OSMB's appeal of the Forest Service decision on Plan Amendment No. 47 was denied by the Forest Service on July 24, 2007.
- .04 Steven Stewart and the Columbia Seaplane Pilots Association (CSPA) also filed administrative appeals which were denied. Subsequently, they filed a lawsuit in Federal District Court (Eugene) against the Forest Service, challenging the authority of the Forest Service to regulate motorboats on Waldo.
- .05 On May 20, 2009, Magistrate Judge Thomas Coffin issued his findings and recommendations in favor of Mr. Stewart and the CSPA by finding that the Forest Service's decision on Amendment No. 47 was "arbitrary and capricious in that the agency failed to conduct a factual inquiry into whether Waldo Lake was navigable at the time the State of Oregon entered the Union but instead relied on an irrebuttable presumption of non-navigability which is irrational."
- .06 On July 13, 2009 Judge Michael Hogan adopted the Findings and Recommendations as final. On July 28, Judge Hogan issued his Final Judgement, in which he ruled that the Forest Service's Decision Notice on Forest Plan Amendment No. 47 "is arbitrary, capricious, and unlawful, and is set aside". Those portions of Forest Plan Amendment No. 47 that prohibited motors and the use of seaplanes were voided.
- .07 Notwithstanding the statutory 10 MPH speed limit imposed by the Oregon Legislature, there is interest in having the Marine Board adopt administrative rules to ban motors and floatplanes. In effect to do what the Forest Service tried but failed to accomplish.
- .08 According to the Forest Service, Waldo Lake is the 13<sup>th</sup> largest lake in Oregon. With a size of 6,298 surface acres, it is second only to Upper Klamath Lake among natural non-alkali lakes in the state. It is the second deepest lake after Crater Lake, with a maximum depth of 420 feet and a mean depth of 128 feet. It sits at an elevation of 5,414 feet.

- .09 On June 27, 2009 following the Federal Court decision, the Oregonian opined that motorboats should be banned on Waldo Lake. The Oregonian's preference was to have the Governor handle this administratively. A copy of the editorial is attached.

Need and Justification for Rule:

- .01 Because the Forest Service failed in their efforts to ban motorboats and floatplanes, motors can still be used. This upsets some persons who use the nearby Waldo Wilderness area, and visitors who prefer to paddle or hike without the possible intrusion of a motorized boat or occasional floatplane. Motors are contrary to the vision and type of experience some people want to create for this area. The mere idea of a motor is upsetting to some users who seek a wilderness experience on the water, on the trails around the lake, or in the adjacent developed campgrounds.
- .02 The 2008 statewide boating survey documented 758 days of use by registered boats for the entire year. 180 days were reported as fishing trips, 508 sailing days, and 69 were cruising. For a lake this size, this is extremely low use, even with a short 150 day summer/fall season. Congestion is not an issue. Sailboats that use auxiliary motors for brief periods to maneuver in and out of the launch ramps are one of the sources of motorized use. Most of their time spend is under sail. This use will be eliminated, so only small day sailboats like Hobie cats or similar small sail craft that don't require auxiliary power will be allowed. Paddling will remain the predominate use, as it is today, but without any possible adverse impacts to their experience caused by an occasional motor.
- .03 The Forest Service wishes to manage the area as a pristine, primitive area, much like the adjacent Waldo Wilderness. In creating the Waldo Wilderness area, Congress specifically prohibited the Forest Service from creating a wilderness buffer on the lake. However, that Congressional prohibition doesn't prevent the State of Oregon from banning motors to create a virtual wilderness area on the lake.
- .04 By banning motors, Waldo will become the largest non-motorized lake in Oregon. It will rival natural primitive wilderness like lake settings such as Yellowstone Lake, lakes in the Boundary Waters Wilderness/Quetico Provincial Park in Minnesota and Ontario, and remote lakes in Alaska.
- .05 There is no evidence to suggest that this rule is necessary for boating safety. The extremely low use numbers and existing 10 MPH speed limit virtually eliminate the potential for accidents due to speed or collision. We have no information which suggests that boating safety is an issue.
- .06 The water quality in Waldo Lake is outstanding. It is one of the cleanest, purest lakes in the state. The Forest Service recognized this outstanding water quality in Forest Plan Amendment No. 47. However, efforts by the Forest Service to document water pollution from motorboats or floatplanes failed to find any evidence of water quality impacts due to extremely low levels of motorized use. We are not aware of any studies that link the

existing low level of motorboat use with adverse impacts to water quality. The lake is closed by snow and weather to all boating most of the year. An alternative to allow only clean low emission 4 stroke engines with a horsepower cap was offered by agency staff to the Forest Service during our participation in the planning process and our appeal. This alternative was rejected, because it doesn't fit with the desired social condition of a motor free lake.

- .07 While the Marine Board cannot regulate floatplanes while in flight, a prohibition on all motorboats will effectively prevent floatplanes from taxiing or otherwise navigating on the lake when not in flight. An exemption to allow emergency landings would be included. Obviously, in a true emergency a pilot will attempt a safe landing regardless of our administrative rules. We have no data on the frequency of float plane traffic. Forest Plan Amendment No. 47 did not document float plane numbers or complaints.
- .08 The Forest Service wanted to allow electric motors under Forest Plan Amendment No. 47. Staff is concerned that allowing electric motors might give persons a false impression that these motors are capable or suitable for travel on Waldo. Because of its large size, and potential for windy conditions, an electric motor might be of limited use and could increase risk. Most electric motors are not capable of travelling across this lake and back without carrying multiple batteries. A complete motor ban would be more consistent with the goal of achieving a wilderness like setting, free of all mechanized travel.
- .09 This administrative rule will fulfill the Forest Service's goal of creating a type of outdoor recreation social experience setting where motors are absent. The rule will implement a Memorandum of Understanding between the Forest Service, Department of State Lands, and Oregon State Marine Board which was prepared by the Oregon Department of Justice at the request of the Governor's Office.
- .10 The existing statewide exemption for official use (OAR 250-020-0005(1)) on waters closed to motors which would allow Forest Service or other government vessels to operate with motors was not deemed acceptable to the Forest Service, which insists that it must give prior authorization for any official use. A compromise to allow official use for search and rescue, law enforcement and fire suppression without prior approval is contained in the MOU. But the Board must grant the Forest Service authority to give prior approval to any other official use. Since the only other "official" use we can contemplate is by the Forest Service itself or some agency working for the Forest Service, they would have to grant themselves prior permission to use motors on the lake.

Recommendation:

- .01 That the Board release a draft rule to prohibit all motorboats and floatplanes from Waldo Lake for a mandatory public comment period of 30 days. We are not planning a public hearing, unless one is requested. The comment period would close November 30, and the rule could be adopted at the December or January Board meeting.

LeTarte, June

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From: Adams Jas Jeffrey <jas.adams@doj.state.or.us>  
Sent: Wednesday, September 30, 2009 10:12 AM  
To: Paul Donheffner; ADAMS Jas; SOLLIDAY Louise; CARRIER Michael \* GOV  
Subject: RE: Waldo Lake MOU  
Attachments: JUSTICE-#1614769-v5-MOU\_Waldo\_Lake.DOC

Paul, Mike and Louise --

**Electric motor provision** -- Given the consensus among all of you, I have deleted from the MOU the sentence about affirmatively allowing electric motors. I will convey the attached draft to the USFS and explain why that provision is being deleted from the MOU, and also address why Oregon does not want previous approval for the enumerated governmental activities. We can see what the USFS says in response and proceed from there.

**Initial vs final rule language** -- I agree with Paul that the *final* wording of the administrative rule cannot be predetermined under the Oregon APA. But to avoid any potential fallout from agreeing to the MOU and then taking a different direction in the administrative actions leading up to the initial rule proposal, I recommend that the notice of rulemaking set forth an *initial* proposed rule that tracks verbatim the standard that is agreed to in the MOU.

**ADA liability** -- Re the electric motor ADA matter Paul mentions, I would appreciate a copy of the ruling on the electric motor ADA issue, if that is available. Although in a quick search we did not find a published court opinion specifically dealing with electric motorboats in the ADA context, we did find analogous authority that suggests a potential for ADA liability. In *Galusha v. NY State Dept. of Environ. Conservation*, 27 F Supp 2d 117, 121, (ND NY 1998), the federal district court ordered the state to allow disabled persons to have motorized access to a park to enjoy recreational opportunities, viewed as a public benefit program regulated by a public entity and hence governed under the ADA:

Personal sacrifice to preserve the environment does not rest solely on the backs of the disabled. Nor are the remaining pristine portions of the environment to be available only to the able-bodied. [at 121]

Although it is true that all visitors are forbidden to use motorized vehicles in restricted areas of the Park, there is no doubt that while persons without disabilities may access those areas on foot, Plaintiffs and other persons with similar disabilities may not. Moreover, Defendants' contention that the motorized vehicle prohibition applies equally to persons with and without disabilities is unavailing. Surely Defendants would not suggest that the provision of other methods of extending physical access to the disabled, such as through constructing widened doorways or ramps, is somehow not required under the ADA because such accommodations are equally unavailable to both persons with and without disabilities. [at 123]

Current policy, whereby a variety of DEC [governmental] and non-DEC personnel stream into protected lands in motorized vehicles daily and without necessity, while persons with disabilities are prohibited from utilizing less obtrusive motorized vehicles necessary for their access to those same lands, is irrational and unfair. Extending to persons with disabilities permission to use limited motorized transport on the same roads currently being used is reasonable and does not cause any undue hardship or fiscal or administrative burdens on the public entity involved. See *Staron*, 51 F.3d at 356; *Innovative Health Sys.*, 931 F.Supp. 222 (S.D.N.Y.1996). [at 125]

The court issued a preliminary injunction that ordered New York to allow disabled persons to have limited motorized access to the state park. The plaintiffs also were seeking \$1M in damages and attorney fees, although the opinion did not reach that issue.

-- Jas.

-----Original Message-----

From: DONHEFFNER Paul

Sent: Tuesday, September 29, 2009 11:11 AM

To: jas.adams@state.or.us; SOLLIDAY Louise; CARRIER Michael \* GOV

Subject: RE: Waldo Lake MOU

Jas:

You may recall that we had an ADA challenge a couple of years ago regarding electric motors. It went before the U.S. Justice Dept. and Dept of Interior as I recall as a civil rights/ADA issue. The bottom line was that recreation is not an essential activity, the state was not required to make every lake open to electric motors for ADA purposes. The complaint was denied, so I'm not really concerned with ADA, and your approach of leaving the MOU silent on electrics makes sense to me.

The bigger concern that I have is that if I'm seeing the MOU right, is that it dictates the outcome of an administrative rule down to prescribing verbatim language. If that's true, how does it play against the Oregon APA law and rules that require an agency to provide open and meaningful opportunity for public review, input, comment and possible revisions to a rule before it is adopted as final. If the final outcome has been determined by the MOU, doesn't this fly in the face of the APA? In 25 years I've never had a final rule decided before we released a draft. Your perspective would be helpful.

Thanks,

> "Adams Jas Jeffrey" 09/29/09 12:56 PM >>>

Paul, Louise and Mike --

Under the MOU, Oregon is agreeing to implement the standards specified in Section 2 by initiating rulemaking. We do not want to agree to substantive provisions in the MOU that we do not then support for adoption in the Oregon administrative rule. Hence, Paul is prudent in wanting to get on the same page at the MOU stage.

The allowance of electric motors was in the USFS proposed rule, and it was in the preliminary draft of our version. We do have an opportunity at this point to attempt to drop that provision in the MOU. Note that deletion of that provision from the MOU does not mean that electric motors are per se prohibited. Deletion of the provision from the MOU, as Paul notes, would simply give the OSMB the discretion to consider whether electric motors are inappropriate for Waldo Lake and to add that prohibition.

From a legal standpoint, affirmatively providing in the MOU and administrative rule that electric motors are allowed would eliminate the potential for an ADA discrimination claim against the OSMB for failure to accommodate those who need an electric motor assist to participate in boating activities. That is the stated

reason why the USFS proposed it in its own regulation.

On the other hand, as Paul observes, there is some risk that boaters might be injured or imperiled if they thought small electric motors were an adequate substitute for gas motors on a large and windy lake subject to sudden adverse conditions. Although the USFS might try to insist on this provision, the counter to that may be to point out that the administrative rule would be Oregon's rule, not a USFS administrative rule.

I had our paralegal do some quick research on whether a ban on electric motors would violate the ADA. See attached memo. Further research could be done, but here is the initial conclusion: The ADA requires the state to allow the disabled to have meaningful access to waterways. It probably cannot ban electric motors entirely. However, if it can be shown that operating an electric motor on a large and windy lake poses a direct threat to the health and safety of others, it might be able to curtail their use. Let me know your direction regarding whether to affirmatively provide in the MOU for use of electric motors on Waldo Lake or delete that provision from the MOU in order to leave that particular aspect up to the discretion of the OSMB.

Thanks -- Jas.

Here's the latest version of the Section 2 standard we've been discussing at our end, with the electric motor provision in italics:

2. Standards for Public Use of Waldo Lake

Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year-round. Use of electric motors in watercraft operated on the surface of Waldo Lake is allowed.

"Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake.

Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by state or federal government officials or agents. Emergency landings of private or governmental floatplanes are allowed without previous approval.

Jas. Jeffrey Adams  
AIC, Natural Resources  
503-947-4500 (Salem); 971-673-2185 (Portland)

-----Original Message-----

From: DONHEFFNER Paul

Sent: Friday, September 25, 2009 10:03 AM

To: jas.adams@state.or.us; SOLLIDAY Louise; CARRIER Michael \* GOV

Subject: RE: Waldo Lake MOU

Jas:

I didn't understand this VERBATIM part until you highlighted it. I get it that we're taking gas motors off. However, as previously discussed, the Board may also want to remove electric motors, because we don't want to give people a false sense that you can get anywhere on a lake that size using a battery. It gets very rough out there, and we don't have a Prius boat yet, nor is it likely anytime soon. Plus, no motors is more consistent with a wilderness setting without non-human powered machinery. I don't care if the FS feels the



need to "approve" their own use. But is this now the actual final rule language? I saw it as a "standard" not the rule itself, and the gist of it was getting gas motors off....got that. Does it have to micromanage all else to the last letter? Would prefer some latitude within the "get gas motors off" sidelines.

Paul Donheffner, Director  
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Salem, OR 97309-5065  
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>>> "Adams Jas Jeffrey" 09/25/09 2:43 PM >>>

I have redrafted below the paragraph that we originally proposed to the USFS in a manner that is consistent with the approach outlined by Mike ("That would make any government use of motors subject to approval except in cases of emergency search and rescue, law enforcement and fire suppression."). Hence, as I understand Mike's direction, previous approval will not be required for the official activities that have been specifically enumerated by the USFS, but previous approval will be required for other activities (except for emergency landings of private or governmental floatplanes).

I have endeavored to make this provision consistent to the extent feasible with the approach taken in the OAR applicable to lakes generally, subject to the recognition that different language is called for here, given the direction that only the enumerated official activities are to be allowed outright. I've attached the entire MOU with this new language.

If the provision below does not accurately capture the consensus from the Oregon side, please advise. We need to be firmly on the same page here, because under the MOU, the provisions of Section 2 would become the text that the OSMB would be required to adopt verbatim in the new OAR applicable to Waldo Lake. -- Jas.  
Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and, fire suppression,. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by state or federal governmental officials or agents. authorized research, trail maintenance, and other activities authorized by the United States Forest Service or Oregon State Marine Board. Emergency landings of private or governmental floatplanes are allowed without previous approval.

Jas. Jeffrey Adams

**Paul Donheffner - RE: Waldo Lake; Holgate**

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**From:** Paul Donheffner  
**To:** Rick Allen  
**Date:** 8/19/2009 1:50 PM  
**Subject:** RE: Waldo Lake; Holgate  
**CC:** 'Trey Carskadon'

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Rick:

I can't imagine you supporting this if you won't support Holgate. But if you'll be a yes vote that will be helpful. There are several hundred uses a year.....making it a big non problem. We're banning that benign use to protect ?

There isn't going to be any big block of opposition, except Steve Stewart who just spent a small fortune to beat the Forest Service in Federal court, and the seaplane pilots who joined in that suit.

Mike also wants us to reverse decision on Holgate. Will you consider that?

Paul

>>> "Rick Allen" <rlallen@rlallengroup.com> 8/19/2009 1:19 PM >>>

I can support the Waldo Lake ban if needed, its not that big a deal is it? Its more not the way we should do business. Paul how many motor boats use that lake. If we must do it, lets do it fast before we get a large group opposing it.

Rick

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**From:** Paul Donheffner [mailto:paul.donheffner@state.or.us]  
**Sent:** Wednesday, August 19, 2009 12:13 PM  
**To:** Trey Carskadon; Brian Carroll; rlallen@rlallengroup.com; gtinker1@verizon.net; Deborah McQueen  
**Subject:** Waldo Lake; Holgate  
**Importance:** High

I just came from what is possibly the worst meeting of my career, with Mike Carrier, Governor's office. He told me in no uncertain terms that the Governor wants the Board to adopt a rule prohibiting motors on Waldo as soon as possible. There was no room for discussion.

I tried arguing that the better way would be through legislation to change the 10 mph statute, and put the lake into a no motor status through legislation. NO NO NO was the answer.

So, we'll need to discuss this and find 3 yes votes. The earliest we can put it on the agenda to open rulemaking will be October, so no final vote likely until Jan. when the lake is under 10 feet of snow.

2196

This doesn't feel good.

I also got pressure to have the Board revisit Holgate channel and give in to paddlers.

It's not a good day in Salem.

Paul

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FAX 503-378-4597

2197

## IN THE COURT OF APPEALS OF THE STATE OF OREGON

COLUMBIA SEAPLANE PILOTS  
ASSOCIATION,  
an Oregon non-profit corporation;  
WALDO LAKE FOR EVERYONE!,  
an Oregon non-profit corporation;  
ARON FAEGRE,  
an individual person; and  
STEVEN K. STEWART,  
an individual person,

Petitioners,

vs.

STATE MARINE BOARD,

Respondent.

CA No. A148192

STIPULATED SUPPLEMENT  
TO RULEMAKING RECORD

Petitioners and the Oregon State Marine Board stipulate as follows:

1. In order to avoid the potential need to appoint a special master, and at the request of legal counsel for petitioners, the Oregon State Marine Board agreed to expand the rulemaking record in this rule challenge to include certain documents that had been released by the Marine Board and the Governor's Office in response to public records requests. In making that agreement, the Marine Board did not agree that a special master was either necessary or desirable.

2. In support of their legal arguments in this rule challenge, petitioners and the Marine Board may use all documents contained in the

expanded rulemaking record filed by the Marine Board, including those documents referred to in paragraph 1 above.

3. The rulemaking record reflects the following facts:

At a regularly scheduled meeting of the Oregon State Marine Board held on January 14, 2010, the members of the Board articulated their concerns with the involvement of the Governor's Office in the rulemaking. The following Board member remarks are reflected in the Board minutes at Rec 12-13. Chair Carskadon commented that the Governor's Office had made it "abundantly clear" how it would like to see the issue go, but he also noted that in the past six years the board members had been "outspoken" and had "pushed back" when they needed to. He added that "to be fair to the Governor, his vision of Waldo Lake is a pristine, non-motorized sanctuary," and that the Governor had been "very clear on what he would like to see of this Board." Board member McQueen said that it had been made "very clear that we serve at the pleasure of the governor," and that "When the boss says make it happen, you can say no and leave but then what." Board member Tinker said that the Board's vote represented a "low moment." Board member Carroll said he felt he had been "placed in a box on the issue" and commented that he had not signed up to be a Board member "to be a puppet for someone else." Board member Allen said that this issue should have been given a "fair shake," and that the public expects

the agency to analyze "issues on [their] merit," but that in the past six to eight months, the Board had had "a lot of political pressure from the Governor's office, legislatures [sic] and others into the rulemaking process."

4. The expanded rulemaking record contains emails from the Governor's Natural Resource Policy Advisor, Mike Carrier, to several Board members. On October 8, 2009, Mr. Carrier emailed Board member Allen explaining that the Governor supported the US Forest Service's plan to ban motors "to foster the wilderness experience that most lake users want and expect" and that the Governor wanted the agency to enter into a memorandum of agreement with the US Forest Service as had been done in 1995; he added: "Paul [Donheffner, the OSMB Executive Director] is balking at that and I need your leadership in persuading him to respect the Governor's request on this one." (Rec 2237). On October 12, 2009, Mr. Carrier emailed Chair Carskadon that "I will assume that [the Waldo Lake matter is] headed in a good direction" and that he had left a message for Board member Allen and a note to board member Carroll. (Rec. 2219). On October 12, 2009, Mr. Carrier emailed Board member Carroll conveying congratulations on Carroll's appointment to the Board and said: "I had wanted to pass on to you the Governor's strong personal view that Waldo Lake should be a motorless water body. Having recreated on the lake for years and formerly representing residents of the Lane

County area who frequently use the lake, he has been an advocate for the Forest service proposal to ban motors and he wanted me to pass on his support for that to the Marine Board." (Rec. 2220).

5. In addition to the foregoing facts drawn from the rulemaking record, and as an additional stipulation to avoid the potential need to appoint a special master, petitioners and the Oregon State Marine Board stipulate that the members of the Marine Board felt pressured by the governor's Office to vote in favor of adopting the proposed rule banning internal combustion-powered boats on Waldo Lake.

6. At the meeting on January 14, 2010, Board members Carskadon, Tinker, Carroll and Allen voted in favor of the Waldo Lake rule adoption. Board member McQueen opposed the rule adoption. (Rec 13).

7. Petitioners and the Oregon State Marine Board further stipulate that, on the basis of the record in this case viewed as a whole, a Special Master would find that, but for the advocacy by the Governor's office, a majority of the board would not have voted in favor of adoption of the administrative rule in question at the Board meeting on January 12, 2010. The Board stipulates that it will not argue to the contrary in this proceeding. Petitioners stipulate that they do not, and will not, argue that the actions of the Governor's office were unlawful or impermissible in any sense beyond the assertion that those actions

constituted an "irregularity[y] in procedure," as that phrase is used in ORS 183.400(5), or otherwise prevented the Board from validly adopting the rules in question. Petitioners further stipulate that, in light of this stipulation, they will not seek the appointment of a Special Master in this proceeding.

8. Upon executing this stipulation, petitioners will immediately withdraw their request for appointment of a special master in this rule challenge.

DATED this 27th day of September, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

/s/ W. Michael Gillette

By: \_\_\_\_\_

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OREGON DEPARTMENT OF JUSTICE

/s/ Denise G. Fjordbeck

By: \_\_\_\_\_

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